(22,797.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 721.

JAMES H. GRAHAM, PLAINTIFF IN ERROR,

vs.

THE STATE OF WEST VIRGINIA.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 17, 1911.

a UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of Appeals of the State of West Virginia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of Appeals of the State of West Virginia before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between James H. Graham and the State of West Virginia wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty,
b or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said James H. Graham, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the thirteenth day of June, in the year of our Lord one thousand nine hundred and eleven.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by:
EDWARD D. WHITE,
Chief Justice of the United States.

c UNITED STATES OF AMERICA, ss:

To State of West Virginia, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days

from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of Appeals of the State of West Virginia, wherein James H. Graham is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this thirteenth day of June, in the year of our Lord one thousand nine hundred and eleven.

EDWARD D. WHITE,
Chief Justice of the United States.

d Service of copy of this citation acknowledged and accepted this 20th day of June, 1911.

WM. G. CONLEY,
Attorney General of the State of West Virginia.

e STATE OF WEST VIRGINIA, *To wit:*

In obedience to the mandate of the foregoing writ, I, Wm. B. Mathews, Clerk of the Supreme Court of Appeals of West Virginia, do herewith return a full and complete transcript of the record and proceedings in the said case of State of West Virginia vs. James H. Graham, with all things concerning the same, as fully and completely as the same appears of record and on file in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of the said Supreme Court of Appeals, at Charleston, this 15th day of June, 1911, and in the 48th year of the State.

[Seal Supreme Court of Appeals, West Virginia.]

WM. B. MATHEWS,
Clerk Supreme Court of Appeals.

f *Transcript of Record.*

In the Supreme Court of Appeals of West Virginia.

No. 1352.

STATE OF WEST VIRGINIA, Plaintiff Below, Defendant in Error,
vs.
JAMES H. GRAHAM, Defendant Below, Plaintiff in Error.

From the Circuit Court of Marshall County.

g *Transcript of Record.*

In the Supreme Court of Appeals of West Virginia.

STATE OF WEST VIRGINIA, Plaintiff Below, Defendant in Error,
vs.
JAMES H. GRAHAM, Defendant Below, Plaintiff in Error.

From the Circuit Court of Marshall County.

Wm. G. Conley, for Plaintiff and Defendant in Error; D. B. Evans; Everett F. Moore, for Defendant and Plaintiff in Error.

h-6 *Transcript of Record.*

In the Supreme Court of Appeals of West Virginia.

No. 1352.

STATE OF WEST VIRGINIA, Plaintiff Below, Defendant in Error,
vs.
JAMES H. GRAHAM, Defendant Below, Plaintiff in Error.

From the Circuit Court of Marshall County.

Be it remembered that heretofore, to-wit, on the 28th day of July, 1909, the following petition and transcript, with order of allowance of the writ of error prayed for in said petition, were filed in the office of the Clerk of the Supreme Court of Appeals of West Virginia:

* * * * * * *

7 *Record.*

STATE OF WEST VIRGINIA,
Marshall County, To wit:

Be it remembered that at a regular term of the Circuit Court held in and for the said County of Marshall, at the Court House of said county, on the 11th day of February, A. D. 1908, among other the following proceedings were had, to-wit:

February Term, 1908.

STATE OF WEST VIRGINIA
vs.
J. H. GRAHAM.

Information.

This day came the State by A. L. Hooton, its attorney, and presented to the Court an information, as provided, in Chapter 165 Section 2 of the Code of West Virginia, against J. H. Graham, and moved the Court to file the same, which motion being considered by the Court is granted, and said information is hereby filed and ordered placed upon the docket, and summons is directed to issue as provided in Chapter 165, Section 3 of said Code, returnable Friday, February 14th, 1908.

Information.

STATE OF WEST VIRGINIA,
Marshall County, To wit:

In the Circuit Court for said County.

Be it remembered that A. L. Hooton, Prosecuting Attorney for Marshall County, West Virginia, in the Circuit Court for said Marshall County, West Virginia, and who in this behalf prosecutes for the said State of West Virginia, in his own proper person, comes into the said Circuit Court on this — day of February, 1908, and here gives the said Circuit Court to understand and
8 be informed that heretofore, to-wit, at a session of the Circuit Court of Pocahontas County, in the State of West Virginia, and in the United States of America, held in the town of Marlington, in and for said County of Pocahontas, on the 6th day of April, 1898, before the Honorable J. W. McWhorter, Judge of said Court, which said Court having competent jurisdiction in all matters relating to felonies and misdemeanors committed in said County of Pocahontas and State of West Virginia, J. H. Graham by name and description of John H. Ratliff, being one and the same person was in due form of law tried and convicted of a felony, to-wit: grand larceny, upon a certain indictment then and there depending against him, the said J. H. Graham by the name and description aforesaid, and which said indictment is of the following tenor and effect, to-wit.

"STATE OF WEST VIRGINIA,
Pocahontas County, To wit:

In the Circuit Court for said County, April Term, 1898.

The grand jurors of the State of West Virginia, in and for the body of the County of Pocahontas, and now attending the said Court, upon their oaths present that John H. Ratliff, on the — day of December, 1897, in the county aforesaid, one bay mare, of the value of fifty dollars, of the goods and chattels of J. W. Miller, then and there being found, unlawfully and feloniously, did steal, take and carry away, against the peace and dignity of the state.

Found upon the evidence of J. W. Miller, Henry Dawson and E. F. Beard.

Sworn in open Court to testify before the grand jury."

And on the said 6th day of April, 1898, the said J. H. Graham, by the name and description of John H. Ratliff, being one and the same person, being led to the bar of said Circuit Court in custody of the jailer of said Pocahontas County for plea to the aforesaid indictment said he was guilty of the offense in the manner and form as therein alleged, and thereupon on the said 6th day of April, 1898, it was adjudged by the said Court, that the said J. H. Graham, by the name

and description of John H. Ratliff, being one and the same person, should be confined in the penitentiary of the State of West Virginia, in the United States of America, for the period of two years, as by the record thereof doth more fully appear.

And this also, to-wit, that the said J. H. Graham, by the name and description of John H. Ratliff, being one and the same person, having been so convicted of a felony and having been duly discharged and remitted of such judgment and conviction, afterwards, to-wit, at a session of the Circuit Court of Mineral County, in the State of West Virginia, and in the United States of America, held in the City of Keyser, in and for said County of Mineral, on the 16th day of April, 1901, before the Honorable R. W. Dailey, Jr., Judge of said Court, which said Court having competent jurisdiction in all matters relating to felonies and misdemeanors committed in said County of Mineral, the said J. H. Graham, by the name and description of J. H. Graham, alias John H. Ratliff being one and the same person, and being one and the same person with the said J. H. Graham who by the name and description of John H. Ratliff was theretofore convicted of a felony in the Circuit Court of said Pocahontas County on the 6th day of April, 1898, was in due form of law tried and convicted of a felony upon a certain indictment then and there depending against him, the said J. H. Graham, by the name and description of J. H. Graham, alias John H. Ratliff, being one and the same person, and which said indictment is of the following tenor and effect, to-wit.

"In the Circuit Court of Mineral County, West Virginia. Found at April Term, 1901.

STATE OF WEST VIRGINIA.
Mineral County, To wit:

In the Circuit Court of said County.

The grand jurors of the State of West Virginia, in and for the body of the County of Mineral, and now attending said Court, upon their oaths, present that J. H. Graham, alias John H. Ratliff, on the twenty-first day of February, A. D. nineteen hundred and one, about the hour of eleven o'clock, in the night time of that day, in said county, a certain out-house, commonly called a stable, belonging to one Sampson Taylor, adjoining to and occupied with the dwelling house of said Sampson Taylor, there situate, feloniously and burglariously did break and enter, with intent the goods and chattels of the said Sampson Taylor, in the said out-house then and there being then and there feloniously and burglariously to steal, take and carry away, and one brown horse, named Harry, of the value of one hundred dollars, of the goods and chattels of the said Sampson Taylor, in the said out-house, in the county aforesaid, then and there being found, then and there feloniously and burglariously did steal, take and carry away, against the peace and diginity of the state.

And the jurors aforesaid, upon their oaths aforesaid, do further

present that J. H. Graham, alias John H. Ratliff, on the twenty-second day of February, A. D. nineteen hundred and one, about the hour of two o'clock, in the night time of that day, in said county, a certain other out-house, commonly called a stable, belonging to one Sampson Taylor, adjoining to and occupied with the dwelling house of said Sampson Taylor, there situate, feloniously and burglariously did enter, without breaking the same, with intent the goods and chattels of the said Sampson Taylor, in the said out-house then and there being, then and there feloniously and burglariously to steal, take and carry away, and one brown horse, named Harry, of the value of one hundred dollars, of the goods and chattels of the said Sampson Taylor, in the said out-house, in the county aforesaid, then and there being found, then and there feloniously and burglariously did steal, take and carry away, against the peace and dignity of the *the* state.

And the jurors aforesaid upon their oaths aforesaid, do further present that J. H. Graham, alias John H. Ratliff, on the — day of February, A. D. nineteen hundred and one, about the hour of — o'clock, in the day time of that day, in said county a certain other out-house commonly called a stable, belonging to one Sampson Taylor, adioining to and occupied with the dwelling house of said Sampson Taylor, there situate, feloniously and burglariously did break and enter, with intent the goods and chatteds of the said Sampson Taylor, in the said out-house then and there being, then and there feloniously and burglariously to steal, take and carry away, and one brown horse, named Harry, of the value of one hundred dollars, of the goods and chattels of the said Sampson Taylor, in the said out-house, in the county aforesaid, then and there
11 being found, then and there feloniously and burglariously did steal, take and carry away, against the peace and dignity of the state.

And the jurors aforesaid, upon their oaths aforesaid, do further present that the said J. H. Graham, alias John H. Ratliff, has been before, by the name of John H. Ratliff, sentenced in the United States to confinement in a penitentiary, to-wit, that on the sixth day of April, A. D. eighteen hundred and ninety-eight, and before the commission of the offense hereinbefore charged, in the preceding counts hereof, in the Circuit Court for the County of Pocahontas, in the State of West Virginia, the same being then and there a Court of competent jurisdiction in the premises, the said J. H. Graham, alias John H. Ratliff, was, by the name of John H. Ratliff, convicted of a felony and sentenced therefor by the judgment of said last mentioned Court to confinement in the penitentiary of West Virginia, for the period of two years.

Against the peace and dignity of the State.

CHAS. N. FINNELL,
Prosecuting Attorney.

Found upon the testimony of —— ——, ——- ——, witnesses, sworn in open Court, and sent before the grand jury to give evidence.

Endorsed on the back: State of West Virginia against J. H. Graham, alias John H. Ratliff. Indictment: For a Felony. A True Bill. Geo. T. Carskadon, Foreman."

And on the 23rd day of April, 1901, the said J. H. Graham, alias John H. Ratliff, at the trial on the indictment last aforesaid for plea thereto, said that he was guilty as therein charged, and on the 24th day of April, 1901, it was adjudged by the said Circuit Court of Mineral County, that the said J. H. Graham, alias John H. Ratliff, be confined in the penitentiary of the State of West Virginia, in the United States of America, for the period of ten years, as by the record thereof doth more fully appear, he, the said J. H. Graham, alias John H. Ratliff being one and the same person with the
12 said J. H. Graham who by the name and description of John H. Ratliff was convicted of a felony in the Circuit Court of Pocahontas County on the 6th day of April, 1898.

And this also, to-wit, that the said J. H. Graham having been so convicted of a felony in the said Circuit Court of Mineral County and sentenced to confinement in the penitentiary of the said State of West Virginia, in the United States of America, and while a convict and prisoner in said penitentiary, was on the 11th day of October, 1906, granted a parole by the Governor of West Virginia, said parole to become effective on or before the 22nd day of December, 1906, and which said parole is of the following tenor and effect to-wit:

"Parole Agreement.

Rules Governing Prisoners on Parole.

1. The paroled prisoner shall proceed at once to the place of employment provided for him, and there remain.

2. Every paroled prisoner shall be required to subscribe in a book, to be kept for that purpose, his signature. He shall report in writing over his signature, to the Warden of the Penitentiary, on the first day of every month until released by law; in accordance with the blank forms furnished by the Warden. Said report shall be countersigned by the person in whose employ the paroled prisoner may be at the time, if employed by another.

3. In case he finds it necessary to change his employment or residence, he shall, when practicable, first obtain the written consent of the Governor, through the Warden of the Penitentiary, but in any event notify the Warden of such change.

4. He shall in all respects conduct himself, honestly avoid evil associations, the use of intoxicating liquors and in general pursue the course of a law abiding citizen.

5. If he fails to report to the Warden monthly as required, or is guilty of doing any act prohibited by these rules or by the proclamation paroling him, he will be subject to return to the penitentiary.

6. Every paroled prisoner shall be liable to be re-taken and again placed within the enclosure of the Penitentiary for any reason
13 that shall be satisfactory to the Governor, and at his sole discretion, until he receives his final discharge.

7. No convict under parole shall be permitted to leave the State of West Virginia, without a permit to do so, issued by the Governor, and if such paroled convict shall leave the State without the

written permission of the Governor, he shall be treated in all respects as if he had escaped from the prison enclosure.

Know All Men By These Presents, That the Governor of West Virginia, desiring to test the ability of J. H. Graham, Serial No. 4035, a prisoner in the West Virginia Penitentiary, to abstain from crime, and to lead an upright, frugal and industrious life, does, by these presents, parole the said J. H. Graham, and permit him temporarily and conditionally to go outside the enclosure of the said Penitentiary for the period of the remainder of his term, as an employé of A. A. Ourman, Attorney-at-law, at Waynesburg, Pennsylvania employed as in accordance with the above rules or until he has been finally discharged by the Governor in pursuance of law. Parole effective on or before December 22, 1906. Permission given to leave the State.

Given under my hand and the Less Seal of the State of West Virginia, at Charleston, this 11th day of October, in the year of our Lord, 1906, and of the State the forty fourth.

[SEAL.] WM. M. O. DAWSON.

By the Governor:

C. W. SWISHER,

Secretary of State.

I, J. H. Graham, an inmate of the West Virginia Penitentiary, hereby declare that I have carefully read, and do clearly understand, the contents and conditions of the above parole, and I hereby accept and do pledge myself honestly to comply with said conditions.

Signed in duplicate this 22d day of October, 1906.

J. H. GRAHAM.

Signed in the presence of

S. G. LEGG,

J. E. BLOYD."

and the said J. H. Graham, under and by virtue of the said
14 parole was permitted to go outside the enclosure of the said penitentiary.

And this also, to-wit: that the said J. H. Graham, alias John H. Ratliff, having been so convicted of a felony in the said Circuit Court of Mineral County, in the State of West Virginia, in the United States of America, and under and by virtue of the aforesaid parole having been permitted to go outside the enclosure of the aforesaid penitentiary, afterwards and while so at large, to wit, at a session of the Criminal Court of Wood County, in the State of West Virginia, and in the United States of America, held in the City of Parkersburg, in and for said County of Wood, on the 11th day of September, 1907, before the Honorable Charles M. Showalter, Judge of said Court, which said Court having competent jurisdiction in all matters relating to felonies and misdemeanors committed in said County of Wood, the said J. H. Graham, by the name and discription of John H. Graham, alias J. H. Gray, he, the said John H.

Graham, alias J. H. Gray, being one and the same person with the said J. H. Graham, who by the name and description of John H. Ratliff was there-fore convicted of a felony in the aforesaid Circuit Court of Pocahontas County on the 6th day of April, 1898, and being one and the same person with the said J. H. Graham, who by the name and description of J. H. Graham, alias John H. Ratliff, was theretofore convicted of a felony in the aforesaid Circuit Court of Mineral County, on the 16th day of April, 1901, was in due form of law tried and convicted of a felony, to-wit, grand larceny, upon a certain indictment then and there depending against him, the said J. H. Graham, by the name and description of John H. Graham, alias J. H. Gray, and which said indictment is of the following tenor and effect, to-wit.

"STATE OF WEST VIRGINIA,
Wood County, To wit:

In the Criminal Court of said County.

The grand jurors, of the State of West Virginia, in and for the body of the said county and now attending the Criminal Court of the said county, upon their oaths present, that John H. Graham, alias J. H. Gray, to-wit, on the — day of June, A. D. 1907, in the said County of Wood, one red roan horse of the value of
15 $75.00, one buggy of the value of $65.00, one set of harness of the value of $15.00 and one saddle of the value of $5.00 of the goods and chattels and property of one R. E. Evans then and there being found, feloniously did steal, take and carry away, against the peace and dignity of the State.

JOHN F. LAIRD,
Prosecuting Attorney for said County.

Found upon the information of —— —— witnesses sworn in Court, and, by order of the Court, sent before the grand jury to give evidence.

(Endorsed:) Indictment for Felony. A True Bill J. F. Partridge, Foreman. Filed in open Court Sept. 4th, 1907, Jno. G. Hogan, Clerk.

And on the 11th day of September, 1907, the said John H. Graham, alias J. H. Gray, at the trial on the indictment last aforesaid for plea thereto said that he was guilty as in the said indictment alleged, and on the 13th day of September, 1907, it was adjudged by the said Criminal Court that the said John H. Graham, alias J. H. Gray, be confined in the penitentiary of the State of West Virginia, in the United States of America, for the period of five years, as by the record thereof doth more fully appear, he, the said John H. Graham, alias J. H. Gray, being one and the same person with the said J. H. Graham, who by the name and description of John H. Ratliff was theretofore convicted of a felony in the aforesaid Circuit

Court of Pocahontas County, on the 6th day of April, 1898, and being one and the same person with the said J. H. Graham, alias John H. Ratliff, was theretofore convicted of a felony in the aforesaid Circuit Court of Mineral County, on the 16th day of April, 1901, and being one and the same person with the said J. H. Graham, who by the name and description of J. H. Graham and while a convict in the penitentiary of the State of West Virginia, in the United States of America, was on the 11th day of October, 1906, granted a parole by the Governor of West Virginia, against the peace and dignity of the State.

Whereupon the said prosecuting attorney prays the consideration of the Court here in the premises, and that due process of law
16 may be awarded against him, the said J. H. Graham, in this behalf, to make him answer to the said State of West Virginia, touching and concerning the premises aforesaid.

A. L. HOOTON,
Prosecuting Attorney for Marshall County, West Virginia.

Endorsed thereon as follows: Circuit Court February Term, 1908. State of West Virgina vs. J. H. Graham Filed in Open Court February 11th, 1908. Victor E. Myers, Clerk. A. L. Hooton, Prosecuting Attorney.

And now at another day to-wit: At the same term of said Circuit Court held on the 14th day of February, A. D. 1908, the following order was entered in said case in Law Order Book No. 13, at page 140, to-wit:

February Term, 1908.

STATE OF WEST VIRGINIA
vs.
J. H. GRAHAM.

Information.

This day came again as well the state by A. L. Hooton, its attorney, as the defendant, J. H. Graham, in his own proper person, in custody of a guard of the penitentiary, and the said defendant being duly inquired of, for plea to said information says he is not the same person named therein and of this puts himself upon the country and the state, by its attorney, doth the like and the trial of this case is set for Monday, February 24th, 1908. Thereupon the said defendant was remanded to the penitentiary.

And now at another day, to-wit: At the same term of said Circuit Court held on the 24th day of February, A. D. 1908, the following order was entered in said case in Law Order Book No. 13, at page 149, to-wit:

17 STATE OF WEST VIRGINIA
vs.
J. H. GRAHAM.

Information.

Filed February Term, 1908.

This day came again as well the state by A. L. Hooton, its attorney, as the defendant, J. H. Graham, in his own proper person, in custody of a guard of the penitentiary, and by Everett F. Moore, his attorney, and the said defendant asked leave of the Court to withdraw his plea, entered on the 14th day of February, 1908, denying his identity as alleged in said information, which leave is granted by the Court, and thereupon the said defendant moved the Court to quash said information, which motion being argued by counsel for plaintiff and defendant, and considered by the Court, is overruled, to which ruling of the Court the defendant excepted, and thereupon the said defendant for plea says he is not the same person named in said information and of this puts himself upon the country and the state by its attorney, doth the like, and a jury being *being* called came as follows, to-wit: Robert D. Miller, W. M. Kittle, John W. Johns, R. A. Turk, J. A. Manning, Henry Fisher, J. C. Reed, I. C. Brown, J. J. Griffith, C. H. Carpenter, Edward Vaughn and Wilson Higgins, who were sworn in due and proper form, and after hearing the evidence for the plaintiff, the defendant offering none, and receiving the instructions of the Court, were sent to their room to consider of their verdict and after a time returned into Court and rendered the following verdict, to-wit: "We, the jury, find that the defendant, J. H. Graham, now in Court, was tried and convicted on the 6th day of April, 1898, in the County of Pocahontas, and State of West Virginia, of a felony, and sentenced to confinement in the penitentiary of the State of West Virginia, for a period of two years, under the name of John H. Ratliff, being one and the same person, and that on the 23rd day of April, 1901, in the County of Mineral, in said State of West Virginia, the said J. H. Graham alias John H. Ratliff, was tried and convicted of a felony and on the 24th day of April 1901, was sentenced to confinement in the penitentiary, of the State of West Virginia, in the United States of America for a period of ten years, he, the said J. H. Graham, alias John H. Ratliff, being

18 one and the same person who by the name and description of John H. Ratliff was convicted of a felony in the Circuit Court of Pocahontas County on the 6th day of April, 1898, and that on the 11th day of September, 1907, in the County of Wood and State of West Virginia, the said J. H. Graham, under the name and description of John H. Graham, alias J. H. Gray, was tried and convicted of a felony in the Criminal Court of said Wood County, West Virginia, and on the 13th day of September, 1907, was sentenced by said Court to be confined in the penitentiary of the State of West Virginia, in the United States of America, for the period of five

years, and that he, the said John H. Graham, alias J. H. Gray, is one and the same person with the said J. H. Graham, who by the name and description of John H. Ratliff was convicted of a felony in the Circuit Court of Pocahontas County, on the 6th day of April, 1898, and that he, the said J. H. Graham, is one and the same person with the said J. H. Graham, who by the name and description of J. H. Graham, alias John H. Ratliff, was convic-ed of a felony in the Circuit Court of Mineral County, on the 16th day of April, 1901. W. M. Kittle, Foreman." And said jury was discharged. Thereupon the said defendant moved the Court to set aside the verdict of the jury rendered as aforesaid and grant him a new trial, the argument of which said motion is deferred to a future day.

And now at another day, to-wit: At a regular term of the Circuit Court held on the 8th day of June, A. D. 1908, the following order was entered in said case in Law Order Book No. 13, at page 179, to-wit:

February Term, 1908.

STATE OF WEST VIRGINIA
vs.
J. H. GRAHAM.

Information.

This day came the State of West Virginia, by the Prosecuting Attorney of Marshall County and then and there came as well also the defendant J. H. Graham, in his own proper person and by Everett F. Moore and D. B. Evans, his attorneys, and the defendant's motion heretofore made to set aside the verdict and grant him a new trial because the verdict is contrary to the law and evidence having been argued by counsel and submitted to the Court, and the Court having maturely considered of the same, is of opinion to, and doth hereby overrule said motion, to which holding and ruling of the Court in overruling and refusing said motion to set aside the verdict and grant him a new trial the defendant objects and excepts.

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And now, after verdict against the said J. H. Graham, and before sentence comes the said J. H. Graham in his own proper person and moves the Court here to arrest judgment herein and not pronounce the same, because of manifest errors in the record appearing, to-wit: First. That the said defendant was proceeded against by information made and filed by the Prosecuting Attorney of Marshall County, West Virginia; and that said proceeding by information is a "Holding to Answer" within the meaning of the provision of Section 4, of Article III of the Bill of Rights of the Constitution of West Virginia, which said provision provides that "No person shall be held to answer for treason, felony, or other crime, not cognizable by a Justice, unless on presentment or indictment of a grand jury," and is therefore contrary to said constitutional provision and is also in conflict with and prohibited by

the 5th and 14th Articles of Amendment to the Constitution of the United States and is therefore void. Second. The Criminal Court of Wood County, West Virginia, had no jurisdiction to try the defendant for the third offense as set forth in the information filed in this cause, as the defendant was a convict serving time in the penitentiary of West Virginia, the jurisdiction being in the Circuit Court of Marshall County, West Virginia, as is by the statute in such case made and provided, the judgment and sentence of the Criminal Court of Wood County, West Virginia, was therefore void. Third. And because no judgment against him the said J. H. Graham can be lawfully rendered on said record.

And the defendant's motion to arrest judgment in this cause having been argued by counsel and submitted to the Court, and the Court having maturely considered of the same, is of opinion to and doth hereby overrule said motion to arrest judgment in this cause, to which ruling of the Court the said defendant objects and excepts.

Thereupon, it appearing to the Court from the verdict and the finding of the jury in this case that the said J. H. Graham
20–49 has been three times convicted of felony in this state and sentenced therefor three times to the penitentiary of this state, it is by the Court ordered, that the said J. H. Graham, be sentenced to confinement in the penitentiary of this state for the period of his natural life.

To which judgment of the Court the defendant objects and excepts.

* * * * * * *

50 At another day, to-wit: At a Supreme Court of Appeals, continued and held at Charleston, on the 22nd day of November, A. D., 1910, the following order was made and entered of record, to-wit:

STATE OF WEST VIRGINIA, Plaintiff Below, Defendant in Error,
vs.
JAMES H. GRAHAM, Defendant Below, Plaintiff in Error.

Upon a Writ of Error to a Judgment of the Circuit Court of Marshall County, Rendered on the 8th Day of June, 1908.

The Court, having maturely considered the transcript of the record of the judgment aforesaid and the arguments of counsel thereon, is of opinion, for reasons stated in writing and filed with the record, that there is no error in said judgment. It is therefore considered by the Court that the judgment of the Circuit Court of Marshall County, rendered in this case on the 8th day of June, 1908, be and the same is hereby affirmed, and that the defendant in error do recover from the plaintiff in error thirty dollars damages and her costs about her defense in this Court in this behalf expended; all of which is ordered to be certified to the Circuit Court of Marshall County.

The decision of points in the foregoing case, as the same appears from the syllabus and written opinion prepared by Judge Robin-

son, was concurred in by Judges Brannon, Poffenbarger, Miller and Williams.

51 The opinion referred to in the final judgment as aforesaid is in words and figures as follows:

52 STATE
v.
GRAHAM.

Marshall County. Affirmed.

Robinson, President.

1. The provisions of Code 1906, chapter 165, sections 1 to 5 inclusive, pursuant to which, by an information in the circuit court of the county in which the penitentiary is situated, there may be imposed the additional sentence provided by law upon a convict who once or twice before had been convicted and sentenced to a penitentiary, are not violative of any constitutional guaranty.

2. By proceedings under the statute mentioned, the convict is not held to answer for a crime so as to require presentment or indictment of a grand jury, nor is he thereby twice put in jeopardy for an offense.

53 ROBINSON, *President:*

John H. Graham, alias John H. Ratliff, alias J. H. Gray, for the third time a convict in the penitentiary at Moundsville, was proceeded against by information in the Circuit Court of Marshall county pursuant to the provisions of Code 1906, chapter 165, sections 1 to 5 inclusive. For clear understanding it seems necessary to recite this statute:

"1. All criminal proceedings against convicts in the penitentiary shall be in the circuit court of the county of Marshall.

"2. When a prisoner convicted of an offense, and sentenced to confinement therefor in the penitentiary, is received therein, if he was before sentenced to a like punishment, and the record of his conviction does not show that he has been sentenced under the twenty-third or twenty-fourth section of chapter one hundred and fifty-two, the superintendent of the penitentiary shall give information thereof, without delay, to the said circuit court of the county of Marshall, whether it be alleged or not in the indictment on which he was so convicted, that he had been before sentenced to a like punishment.

"3. The said court shall cause the convict to be brought before it, and upon an information filed, setting forth the several records of conviction, and alleging the identity of the prisoner with the person named in each, shall require the convict named to say whether he is the same person or not.

"4. If he say he is not, or remain silent, his plea, or the fact of his silence, shall be entered of record, and a jury shall be impaneled

to inquire whether the convict is the same person mentioned in the several records.

"5. If the jury find that he is not the same person, he shall be remanded to the penitentiary; but if they find that he is the same person, or if he acknowledge in open court, after being duly cautioned, that he is the same person, the court shall sentence
54 him to such further confinement as is prescribed by chapter one hundred and fifty-two, on a second or third conviction, as the case may be."

The information averred that Graham, in 1898, was convicted and sentenced to the penitentiary for two years, in the circuit court of Pocahontas county; that, in 1901, for a subsequent offense, he was convicted and sentenced to the penitentiary for ten years, in the circuit court of Mineral county; that he was paroled from the penitentiary while serving the sentence last mentioned; that, in 1907, for a third offense, he was convicted and sentenced to the penitentiary for five years, in the criminal court of Wood county; that the indictment under which he was convicted in Mineral county set forth the former conviction and sentence in Pocahontas county; and that the indictment under which he was convicted in Wood county did not set forth or show either of the former convictions or sentences. The information, filed by the prosecuting attorney of Marshall county, was specific and direct in its averments of the facts and records of the several convictions and sentences. It prayed that Graham be proceeded against and made to answer the State in the premises. He was brought before the court in the custody of a guard of the penitentiary. He appeared to the information filed against him and moved to quash the same. The motion to quash was overruled; and thereupon for plea he said, that he was not the same person named in the information as having been twice before convicted and sentenced to the penitentiary. Issue was joined on this plea, and the same was tried by a jury. By the verdict it was found that the defendant Graham was the same person who formerly had been convicted and sentenced, as alleged, in the counties of Pocahontas and Mineral. Motion to set aside the verdict and grant a new trial and motion in arrest of judgment were overruled. Thereupon the court sentenced Graham to the penitentiary for life, that being the sentence provided for convicts who have twice before been sentenced in the United States to confinement in a penitentiary. Code 1906, Ch. 152, Sec. 25.

By this writ of error it is sought, upon many grounds, to
55 overthrow the proceedings and sentence. It is submitted that the information should have been quashed because it was not verified. This objection was not good. A prosecuting officer need not swear to an information which he officially tenders, unless the statute so directs, since he acts under his official oath. 1 Bishop Crim. Pro., sec. 713. The exceptions which relate to the trial itself, involving the admissibility and weight of evidence, are by no means well taken. The identity of Graham as the person formerly convicted and sentenced was clearly and regularly established, if there was warrant in law for such proceedings as were had. Nor is there anything

in the point that the criminal court of Wood county did not have jurisdiction of the trial of a paroled convict for an offense committed by him in that county. But a question of merit is presented: Is the statute upon which the proceedings were founded constitutional and valid?

The statute is not contrary to any constitutional provision. It is a valid act. It is not a violation of the provision that one shall not be held to answer for treason, felony, or other crime not cognizable by a justice, unless on presentment or indictment of a grand jury. The proceedings for increased sentence are not a holding to answer for the crime to which that sentence belongs. Graham had already been held to answer for the crime itself—for the establishment of the fact of guilt. This holding for crime was by indictment in the criminal court of Wood county. By these proceedings he is not held to answer for an offense. He is not made to defend against a charge for crime. He is in no wise called upon to answer in relation to alleged crime. No allegation of crime is in the information. It only alleges his status as a convict. It alleges that he has been held to answer for crime and that he stands convicted of it through the indictment of a grand jury. It points him out as a convict already held, upon whom rests the general sentence of the law of life imprisonment. That general sentence is: "When any such convict shall have been twice before sentenced in the United States to confinement in a penitentiary, he shall be sentenced to be confined in the
56 penitentiary for life." Code 1906, Ch. 152, Sec. 24. The proceedings under the statute are for identification only. They are clearly not for the establishment of guilt. The question of guilt is not reopened. The information only calls upon the convict to answer alleged identification for sentence. The constitution does not provide that such procedure must be by presentment or indictment of a grand jury.

Nor was Graham again put in jeopardy for the offense as to which he stood convicted in Wood county. The constitution does forbid that one be twice put in jeopardy of life or liberty for the same offense. But it does not forbid that the Legislature may provide proceedings for the identification of those convicted of crime upon whom as a class the law imposes additional punishment. By a single jeopardy the former convict has been held to answer and the offense established against him. Thus he has been classed with those over whom, by law, hangs additional imprisonment. It only remains for him to be properly identified as belonging to that class. The identification may be at the time of the trial for the offense, if the facts are then known and alleged; or it may be later, at the penitentiary, when the facts develop. This later identification is not a second jeopardy for the offense. It is only an incident to the jeopardy that already exists. Nor is the additional sentence a second punishment for the offense. But one punishment is made to attach to the crime.

Our law does not make it an offense or crime for one to have been convicted more than once. Former conviction is not an integral part of the second or new offense. The law simply enjoins longer sentence because of former conviction. It does not prosecute and pun-

ish for the former conviction. It cannot do that. It adds punishment for the crime as to which one is lastly convicted because of the class to which he belongs. Moore v. State of Missouri, 159 U. S. 673, and the cases cited therein. The sentence is an incident to the last offense alone. But for that offense it would not be imposed.

So proceedings made under this statute cannot be said to
57 constitute a holding to answer for crime or a placing in second jeopardy for an offense. They are merely ancillary proceedings for the rightful sentence which the law mandatorily enjoins upon those already held or jeopardized.

It is said that the trial and sentence in Wood county foreclosed and forever adjudicated the question of length of sentence. If the facts justifying the longer sentence had in that trial been alleged and proved, that rightful sentence could very properly have been imposed there. But the Legislature has seen fit to provide for the imposition of such sentence after trial for the crime to which it may properly attach, whenever it has not been imposed in the trial court. We observe no constitutional restrictions against the statute which has been enacted in this particular. Since the mere imposing of the additional sentence warranted by law is not a holding to answer for crime, is not a second jeopardy or punishment for the offense itself to which the sentence rightfully belongs, and is clearly due process of law, what constitutional limitation has been placed upon legislation in this particular? None.

Statutes like the one under consideration are of long standing and acceptable recognition. Mr. Bishop, writing of the statutory forms of the provisions for increased punishment because of former conviction, notices the one which "permits the prosecuting officer to bring up from the place of confinement prisoners who have before been convicted, and on showing the conviction, to have the additional penalty imposed." 1 Bishop Crim. Law, sec. 959. A form for such proceedings is shown in Bishop's Directions and Forms, sec. 97. In Virginia, provisions of a statute identical with those involved here have been upheld as constitutional and valid. King v. Lynn, Penitentiary Superintendent, 90 Va. 345.

Discussing a statute of the character of the one here involved, Parker, C. J., in Ross' Case, 2 Pick. 171, stated that which is particularly applicable to the case at hand: "This is not an information of an offense for which a trial is to be had, but of a fact, namely, that

the prisoner has already been convicted of an offense; and
58–70 this fact must appear, either by his own confession, or by the verdict of a jury, or otherwise according to law, before he can be sentenced to the additional punishment. Is he to be sentenced for an offense distinct from the one for which he has been tried upon an indictment? We apprehend not; but the only question is, whether he is such person as ought to have been sentenced, on his last conviction, to additional punishment, if the fact of a former conviction had then been known to the court. There was no need of a presentment by a grand jury, for no offense was to be inquired into. That had been already done. An indictment is confined to the question whether an offense has been committed. Here

the question was simply whether the party had been convicted of an offense."

An affirmance of the judgment sentencing the prisoner to life imprisonment is demanded by the record. It will be so ordered.

* * * * * * *

71 In the Supreme Court of Appeals of the State of West Virginia.

No. 1352.

JAMES H. GRAHAM, Plaintiff in Error,
vs.
STATE OF WEST VIRGINIA, Defendant in Error.

Petition for Writ of Error from the Supreme Court of the United States.

Frank J. Hogan, Everett F. Moore, D. B. Evans, Attorneys for Petitioner.

72 In the Supreme Court of Appeals of the State of West Virginia.

No. 1352.

JAMES H. GRAHAM, Plaintiff in Error,
vs.
STATE OF WEST VIRGINIA, Defendant in Error.

Petition for Writ of Error from the Supreme Court of the United States.

The petition of James H. Graham respectfully states as follows:

1. That your petitioner is a citizen of the United States and a resident of the State of West Virginia, and is now confined in the penitentiary of said State under a sentence of imprisonment therein for life, which sentence is predicated *of* a certain statute (commonly called the Habitual Criminal Act) and of certain proceedings thereunder, which statute and proceedings are repugnant to the Constitution of the United States, as hereinafter set forth.

2. That the Code of West Virginia, chapter 152, section 23, provides:

"When any person is convicted of an offense and sentenced to confinement therefor in the penitentiary, and it is alleged in the
73 indictment on which he is convicted, and admitted, or by the jury found, that he had been before sentenced in the United States to like punishment, he shall be sentenced to be confined five years in addition to the time which he is or would be otherwise sentenced."

3. That chapter 152, section 24, of said Code provides:

"When any such convict shall have been twice before sentenced

in the United States to confinement in a penitentiary, he shall be sentenced to be confined in the penitentiary for life."

4. That the Code of West Virginia, chapter 165, sections 1 to 5 inclusive provides:

"1. All criminal proceedings against convicts in the penitentiary shall be in the circuit court of the county of Marshall.

"2. When a prisoner convicted of an offense, and sentenced to confinement therefor in the penitentiary, is received therein, if he was before sentenced to a like punishment, and the record of his conviction does not show that he has been sentenced under the twenty-third or twenty-fourth section of chapter one hundred and fifty-two, the superintendent of the penitentiary shall give information thereof, without delay, to the said circuit court of the county of Marshall, whether it be alleged or not in the indictment on which he was so convicted, that he had been before sentenced to a like punishment.

"3. The said court shall cause the convict to be brought before it, and upon an information filed, setting forth the several records of conviction, and alleging the identity of the prisoner with the person named in each, shall require the convict named to say whether he is the same person or not.

"4. If he say he is not, or remain silent, his plea, or the fact of his silence, shall be entered of record, and a jury shall be impaneled to inquire whether the convict is the same person mentioned in the several records.

"5. If the jury find that he is not the same person, he shall be remanded to the penitentiary; but if they find that he is the same person, or if he acknowledge in open court, after being duly cautioned, that he is the same person, the court shall sentence him to such further confinement as is prescribed by chapter one hundred and fifty-two, on a second or third conviction, as the case may be."

5. That article 3, section 4, of the constitution of West Virginia provides:

"No person shall be held to answer for treason, felony, or other crime, not cognizable by a justice, unless on presentment or indictment of a grand jury."

74 6. That article 3, section 5, of the constitution of West Virginia provides:

"No person shall be twice put in jeopardy of life or liberty for the same offense."

7. That article 3, section 5, clause 2, of the constitution of West Virginia provides:

"Penalties shall be proportioned to the character and degree of the offense."

8. That article 3, section 14, clause 1, of the constitution of West Virginia provides:

"Trials of crimes and misdemeanors * * * shall be * * * in the county where the alleged offense was committed." * * *

9. That article 3, section 14, of the constitution of West Virginia provides:

"The accused shall be fully and plainly informed of the character and cause of the accusation."

10. That the Code of West Virginia, rule 18 of construction, page 134, provides:

"The word 'offence' includes every act or omission for which a fine, forfeiture, or punishment is imposed by law."

11. That the Code of West Virginia, chapter 152, section 1, provides:

"Offences are either felonies or misdemeanors. Such offences as are punishable with death or confinement in the penitentiary are felonies; all other offences are misdemeanors."

12. That by the foregoing provisions of the constitution and laws of West Virginia, which were in full force and effect, and as well the provisions of section one of the fourteenth amendment to the federal constitution which provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without
75 due process of law; nor deny to any person the equal protection of the laws,"—

your petitioner was guaranteed the right that—

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury; * * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb,— * * *

as provided in the fifth amendment restraining the action of the federal government; and by the aforesaid provisions of the fourteenth amendment and the constitution of West Virginia your petitioner was as well guaranteed the right to be tried only where the alleged crime was committed "and to be informed of the nature and cause of the accusation," as provided in the sixth amendment restraining the action of the federal government.

13. That your petitioner's right of immunity from double jeopardy and double punishment is fundamental, and is expressly recognized both by the federal and state constitutions as aforesaid, and can not be taken away by any statute of the said State; and although the state constitution may take away his immunity from being held to answer for an infamous crime unless on presentment or indictment of a grand jury, yet as it not only does not do so but affirmatively provides that—

"No person shall be held to answer for treason, felony, or other crime, not cognizable by a justice, unless on presentment or indictment of a grand jury,"—

the aforesaid Habitual Criminal Act, requiring prosecutions under it to be by information, is repugnant not only to the state but also to the federal constitution, as hereinafter more fully set forth.

14. That on February 11, 1908, the then prosecuting attorney for Marshall County, West Virginia, in which County, at
76 Moundsville, is located the West Virginia Penitentiary, filed in the circuit court of said County an information without oath against your petitioner, in which it was alleged in substance:

A. That in the circuit court of Pocahontas County, West Virginia, on April 6, 1898, your petitioner was convicted of larceny on an indictment therefor, and was sentenced to confinement in the said penitentiary for two years.

B. That after your petitioner had served said sentence, in the circuit court of Mineral County, West Virginia, on April 23, 1901, he was convicted of burglary on an indictment therefor, which also alleged said former conviction, and on April 24, 1901, he was sentenced to confinement in the said penitentiary for ten years; that the minimum sentence for said offense was five years, so that the said ten year sentence included the five years additional time required by the aforesaid provisions of chapter 152, section 23, of the Code of West Virginia.

C. That while on parole under said second sentence, in the circuit court of Wood County, West Virginia, on September 13, 1907, your petitioner was convicted of larceny on an indictment therefor, and was sentenced to confinement in the said penitentiary for five years; but this indictment did not allege either or both of the former convictions.

15. That on February 24, 1908, your petitioner moved to quash said information, but his motion was denied; and he then pleaded the only defense allowed by said statute, namely, that he is not the same person named in the records recited in said information; on which plea issue was joined and tried to a jury, which found said single point in issue against your petitioner; that your petitioner then moved the said court to set aside the verdict and grant a new trial because the verdict was contrary to the law and evidence, which motion was overruled; that thereupon your petitioner moved the said court to arrest judgment on said verdict because, among other reasons, the said proceeding by information was—

"in conflict with and prohibited by the 5th and 14th Articles of Amendment to the Constitution of the United States, and is therefore void."—

77 which motion was also denied; and thereupon the said court, on June 8, 1908, entered the following judgment:

"Thereupon, it appearing to the court from the verdict and finding of the jury in this case that the said J. H. Graham has been three times convicted of felony in this State and sentenced therefor three times to the penitentiary of this State, it is by the court ordered that the said J. H. Graham be sentenced to confinement in the penitentiary of this State for the period of his natural life."

16. That on July 22, 1909, your petitioner was duly allowed a writ of error from the Supreme Court of Appeals of West Virginia to the said circuit court of Marshall County, to review the said life sentence, on his petition for such writ, assigning, among other errors, that—

"The court erred in holding that the statute, under which this proceeding was had, is not in conflict with so much of the fifth (5) Article of Amendment to the Constitution of the United States as provides that, 'No person shall be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury.'

"The court erred in holding that the statute under which this proceeding was had is not in conflict with and prohibited by so much of the Fourteenth (14) Article of Amendment to the Constitution of the United States as provides as follows: 'Nor shall any State deprive any person of life, liberty, or property, without due process of law.'

"The court erred in refusing your petitioner's motion in arrest of judgment and not discharging him."

17. That on November 22, 1910, the said Supreme Court of Appeals of West Virginia, which is the highest court of the State in which a decision in this suit can be had, affirmed the said life sentence in all things, in an opinion by the President Judge of said Court, in which the said Court decided, according to the syllabi prepared by the said Court itself, that—

"1. The provisions of Code 1906, chapter 165, sections 1 to 5 inclusive, pursuant to which, by an information in the circuit court of the county in which the penitentiary is situated, there may
78 be imposed the additional sentence provided by law upon a convict who once or twice before has been convicted and sentenced to a penitentiary, are not violative of any constitutional guaranty.

"2. By proceedings under the statute mentioned, the convict is not held to answer for a crime so as to require presentment or indictment of a grand jury, nor is he thereby twice put in jeopardy for an offense."

18. That in the said courts your petitioner specially set up and claimed his immunity under the federal constitution not to be held to answer the offence alleged in the information unless on a presentment or indictment of a grand jury; and he also specially set up and claimed his immunity under the federal constitution from double jeopardy and double punishment for the offense alleged; and he also specially set up and claimed that the said Habitual Criminal Act is repugnant to the fourteenth amendment to the federal constitution (and the fifth amendment if made applicable to the States by the fourteenth amendment), in that the said statute denies him certain privileges and immunities to which he is entitled as a citizen of the United States, and deprives him of his liberty and property without due process of law, and denies him the equal protection of the laws in the respects hereinafter more particularly set forth; all of which federal questions were decided against your petitioner, and the said decision of the said Supreme Court of Appeals of West Virginia was in favor of the validity of said statute, and was against the said privileges and immunities specially set up and claimed by your petitioner under the constitution of the United States.

19. That thereafter your petitioner duly prayed the said court and the said President Judge thereof to grant him a writ of
79 error from the Supreme Court of the United States to review the said judgment affirming the said sentence, but such writ of error was denied on February 21, 1911, by the said court and the said President Judge thereof.

20. That your petitioner is deprived of his liberty and property by the State of West Virginia without due process of law in that—

A. The said statute (commonly called the Habitual Criminal Act) concludes every defence against your petitioner except only that of non-identity, so that not even a pardon or want of jurisdiction of and concerning the prior convictions could be shown by your petitioner.

B. The said statute permits and requires prosecution by information, and your petitioner was prosecuted and sentenced thereunder as aforesaid by information without oath, for what the constitution and laws of the said State and of the United States define as an infamous crime and an offense which is a felony, and punishable by the said statute by imprisonment in the penitentiary for life.

21. That your petitioner's privileges and immunities as a citizen of the United States are abridged by the State of West Virginia in making and enforcing the said statute (commonly called the Habitual Criminal Act) in that your petitioner is thereby denied his immunity from double jeopardy in that—

A. The said statute permits and requires, and there has been rendered and enforced thereunder, against your petitioner, two separate and distinct sentences one each by two separate and distinct courts at separate and distinct times in separate and dis-
tinct jurisdictions in separate and distinct proceedings upon
80 what is in substance but one and the same verdict returned into but one court, although both the federal and state constitutions expressly declare the fundamental right and require that no person shall be twice put in jeopardy of life or liberty for the same offence.

B. The said statute requires that even if the prior convictions be alleged in the indictment,—

"whether it be alleged or not in the indictment on which he was so convicted that he had been before sentenced to a like punishment"—

yet if—

"the record of his conviction does not show that he has been sentenced * * * to be confined in the penitentiary for life"—

in case of two prior convictions, he shall thereafter, in another court, in another jurisdiction, in another and independent proceeding, by information not under oath, in which proceeding every defense except non-identity is concluded against him, be again subjected to the same jeopardy in which he was before placed when put on trial on an indictment alleging his former convictions in addition to the particular crime then involved.

C. He had previously and on a second conviction been sentenced to serve and had served five years in the said penitentiary, as aforesaid, solely by reason of a previous and first conviction in said

State, yet the said present life sentence is necessarily based upon and inherently includes the said second conviction and the said punishment therefor, and again subjects him to punishment therefor.

D. By the laws of the said State, prior convictions are made an essential part of an indictment for a subsequent crime and an inherent element of such subsequent crime itself, and when
81 such prior convictions are not alleged in the indictment for such subsequent crime, and the accused is found guilty of the particular subsequent crime involved, and is sentenced to and confined in the penitentiary for such subsequent crime, and a subsequent and additional sentence for such prior convictions is imposed by another court in another county in another proceeding, your petitioner is thereby put twice in jeopardy for such first and second convictions; because as to them he was necessarily put in jeopardy on his said third trial and conviction; and the same result would have followed, if such prior convictions had been alleged in the third indictment but had not been proved, and whether as to them the jury had found your petitioner guilty or not guilty or had made no mention thereof in their verdict.

22. That your petitioner is a person within the jurisdiction of the State of West Virginia, and is denied by the said State the equal protection of the laws in that—

A. The said statute (commonly called the Habitual Criminal Act) requires the said prosecution against your petitioner to be by information, and the sentence to be to the penitentiary for life, whereas the constitution and laws of said State (except only this statute) require all acts or omissions punishable by imprisonment in the penitentiary to be prosecuted and punished "on a presentment or indictment of a grand jury," and not otherwise.

B. The said statute requires the said prosecution against your petitioner to be in the circuit court of Marshall County, West Virginia, although the three alleged convictions were had in other courts in other counties, and requires the said circuit court
82 of Marshall County to sentence your petitioner to imprisonment in the penitentiary for life, whereas the constitution and laws of the said State (except only this statute) require that trials of crimes and misdemeanors shall be "in the county where the alleged offence was committed," the word "offence" is defined by the aforesaid statute of the said State to include every act or omission for which a fine, forfeiture, or punishment, is imposed by law, offenses are likewise defined as either felonies or misdemeanors, and such offenses as are punishable with death or confinement in the penitentiary are felonies, and all other offenses are misdemeanors.

C. The laws of said State (except only this statute) require in all cases involving prior convictions that they shall be alleged in the indictment for the subsequent offense, and shall be proved in that case, and not otherwise, or the sentence therefor shall be void.

D. The constitution and laws of said state (except only this statute) require that "penalties shall be proportioned to the character and degree of the offense," yet the first alleged conviction of your petitioner was for larceny, the second for burglary, and the

third for larceny, the penalty for each of which offences was proportioned to the character and degree thereof and was suffered therefor, and now for the mere status produced by such convictions this statute subjects your petitioner to imprisonment in the penitentiary for life; and this penalty is disproportionate "to the character and degree of the offense," as "offense" is defined as aforesaid by the laws of the said State.

23. That in and by the said final judgment of the said Supreme Court of Appeals of West Virginia, and in and by the proceedings had prior thereto, in this cause, certain errors were committed to the prejudice of your petitioner, as hereinbefore set forth, all of
83 which will more in detail appear from the duly certified copy of the transcript of the record and proceedings in this cause and from the assignment of errors presented herewith.

Wherefore your petitioner prays that a writ of error from the Supreme Court of the United States may issue in this behalf to the said Supreme Court of Appeals of the State of West Virginia, and to the Judges thereof, to the end that the errors complained of may be corrected, and that the said judgment may be revised and reversed; that citation may be granted; and that the bond for costs in error may be fixed and approved.

And, as in duty bound, your petitioner will ever pray, etc.

JAMES H. GRAHAM,
Petitioner.

84 COUNTY OF MARSHALL,
State of West Virginia, ss:

Personally appeared James H. Graham before me, a Notary Public in and for the County of Marshall, in the State of West Virginia, to me personally well known, who, having been by me first duly sworn, deposes and says that he is the petitioner named in the foregoing petition by him subscribed; that he has read the same, and knows the contents thereof; that the matters and things therein stated upon his personal knowledge are true, and that those therein set forth upon information and belief he believes to be true.

JAMES H. GRAHAM.

Subscribed and sworn before me this 8th day of May, A. D. 1911.

[SEAL.] R. M. AYERS,
Notary Public in and for the County of Marshall, in the State of West Virginia.

My commission expires January 24th, 1920.

FRANK J. HOGAN,
EVERETT F. MOORE,
D. B. EVANS,
Attorneys for Petitioner.

Filed Jun- 16, 1911. Wm. B. Mathews, Clerk Supreme Court of Appeals.

A true copy.
Attest:
WM. B. MATHEWS, *Clerk.*

85 In the Supreme Court of Appeals of the State of West Virginia.

No. 1352.

JAMES H. GRAHAM, Plaintiff in Error,
vs.
STATE OF WEST VIRGINIA, Defendant in Error.

Assignment of Errors on Petition for Writ of Error from the Supreme Court of the United States.

Frank J. Hogan, Everett F. Moore, D. B. Evans, Attorneys for James H. Graham, Plaintiff in Error.

86 In the Supreme Court of Appeals of the State of West Virginia.

No. 1352.

JAMES H. GRAHAM, Plaintiff in Error,
vs.
STATE OF WEST VIRGINIA, Defendant in Error.

Assignment of Errors on Petition for Writ of Error from the Supreme Court of the United States.

Comes here now James H. Graham, plaintiff in error, by his Attorneys, and says that in the record, proceedings, decision, and final judgment, of the Supreme Court of Appeals of the State of West Virginia, in this case, there is manifest error in this:

1. The court erred in holding that the provisions of chapter 165, sections 1 to 5 inclusive, of the Code of West Virginia, not violative of any federal constitutional guaranty and are not repugnant to the Constitution of the United States.

2. The court erred in holding that by proceedings under the said state statute the accused is not held to answer for a crime
87 so as to require presentment or indictment of a grand jury as guaranteed by the federal constitution as well as by the constitution of the said State.

3. The court erred in holding that by proceedings under the said state statute the accused is not thereby twice put in jeopardy for an offence in violation of his fundamental right of immunity from double jeopardy as guaranteed by the federal constitution as well as by the constitution of the said state.

4. The court erred in rendering its decision in favor of the validity of the said statute under the federal constitution, and against the privileges and immunities specially set up and claimed by the accused under the constitution of the United States, because

the said statute and the proceedings thereunder are repugnant to and in violation of the constitution of the United States in this:

A. That the accused is deprived of his liberty and property by the State of West Virginia without due process of law in that——

(*a*) The said statute (commonly called the Habitual Criminal Act) concludes every defense against your petitioner except only that of non-identity, so that not even a pardon or want of jurisdiction of and concerning the prior convictions could be shown by your petitioner.

(*b*) The said statute permits and requires prosecution by information, and your petitioner was prosecuted and sentenced thereunder as aforesaid by information without oath, for what the constitution and laws of the said State and of the United States define as an infamous crime and an offense which is a felony, and punishable by the said statute by imprisonment in the penitentiary for life.

88 B. That the accused's privileges and immunities as a citizen of the United States are abridged by the State of West Virginia in making and enforcing the said statute in that the accused is thereby denied his immunity from double jeopardy in that—

(*a*) The said statute permits and requires, and there has been rendered and enforced thereunder, against your petitioner, two separate and distinct sentences one each by two separate and distinct courts at separate and distinct times in separate and distinct jurisdictions in separate and distinct proceedings upon what is in substance but one and the same verdict returned into but one court, although both the federal and state constitutions expressly declare the fundamental right and require that no person shall be twice put in jeopardy of life or liberty for the same offence.

(*b*) The said statute requires that even if the prior convictions be alleged in the indictment,—

"whether it be alleged or not in the indictment on which he was so convicted that he had been before sentenced to a like punishment"—

yet if

"the record of his conviction does not show that he has been sentenced * * * to be confined in the penitentiary for life"—

in case of two prior convictions, he shall thereafter, in another court, in another jurisdiction, in another and independent proceeding, by information not under oath, in which proceeding every defense except non-identity is concluded against him, be again subjected to the same jeopardy in which he was before placed when put on trial on an indictment alleging his former convictions in addition to the particular crime then involved.

89 (*c*) He had previously and on a second conviction been sentenced to serve, and had served five years in the said penitentiary, as aforesaid, solely by reason of a previous and first conviction in said State, yet the said present life sentence is necessarily based upon and inherently includes the said second conviction and the said punishment therefor, and again subjects him to punishment therefor.

(*d*) By the laws of the said State, prior convictions are made an essential part of an indictment for a subsequent crime and an inherent element of such subsequent crime itself, and when such prior convictions are not alleged in the indictment for such subsequent crime, and the accused is found guilty of the particular subsequent crime involved, and is sentenced to and confined in the penitentiary for such subsequent crime, and a subsequent and additional sentence for such prior convictions is imposed by another court in another county in another proceeding, your petitioner is thereby put twice in jeopardy for such first and second convictions, because as to them he was necessarily put in jeopardy on his said third trial and conviction; and the same result would have followed if such prior convictions had been alleged in the third indictment but had not been proved, and whether as to them the jury had found your petitioner guilty or not guilty or had made no mention thereof in their verdict.

C. That the accused is a person within the jurisdiction of the State of West Virginia, and is denied by the said State the equal protection of the laws in that—

90 (*a*) The said statute (commonly called the Habitual Criminal Act) requires the said prosecution against your petitioner to be by information, and the sentence to be to the penitentiary for life, whereas the constitution and laws of said State (except only this statute) require all acts or omissions punishable by imprisonment in the penitentiary to be prosecuted and punished "on a presentment or indictment of a grand jury," and not otherwise.

(*b*) The said statute requires the said prosecution against your petitioner to be in the circuit court of Marshall County, West Virginia, although the three alleged convictions were had in other courts in other counties, and requires the said circuit court of Marshall County to sentence your petitioner to imprisonment in the penitentiary for life, whereas the constitution and laws of the said State (except only this statute) require that trials of crimes and misdemeanors shall be "in the county where the alleged offence was committed," the word "offense" is defined by the aforesaid statute of the said State to include every act or omission for which a fine, forfeiture, or punishment, is imposed by law, offenses are likewise defined as either felonies or misdemeanors, and such offenses as are punishable with death or confinement in the penitentiary are felonies, and all other offenses are misdemeanors.

(*c*) The laws of said State (except only this statute) require in all cases involving prior convictions that they shall be alleged in the indictment for the subsequent offense, and shall be proved in that case, and not otherwise, or the sentence therefor shall be void.

91 (*d*) The constitution and laws of said State (except only this statute) require that "penalties shall be proportioned to the character and degree of the offense," yet the first alleged conviction of your petitioner was for larceny, the second for burglary, and the third for larceny, the penalty for each of which offences was proportioned to the character and degree thereof and was suffered therefor, and now for the mere status produced by such convictions this statute subjects your petitioner to imprisonment in the peniten-

tiary for life; and this penalty is disproportionate "to the character and degree of the offense," as "offense" is defined as aforesaid by the laws of the said State.

5. The court in affirming the judgment of the circuit court of Marshall County, West Virginia.

Wherefore the said James H. Graham, plaintiff in error, prays that the said judgment may be reviewed and reversed.

FRANK J. HOGAN,
EVERETT F. MOORE,
D. B. EVANS,
Attorneys for James H. Graham, Plaintiff in Error.

Filed Jun- 16, 1911. Wm. B. Mathews, Clerk, Supreme Court of Appeals.

A true copy.
Attest:
WM. B. MATHEWS, *Clerk.*

92 Know all men by these presents, That we, James H. Graham, as principal, and James T. Miller and James D. Parriott, as sureties, are held and firmly bound unto State of West Virginia in the full and just sum of three hundred ($300.00) dollars, to be paid to the said State of West Virginia, its certain attorney, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this eighth day of May, in the year of our Lord one thousand nine hundred and eleven.

Whereas, lately at a Supreme Court of Appeals of the State of West Virginia, in a suit depending in said Court, between James H. Graham and the State of West Virginia a judgment was rendered against the said James H. Graham, and the said James H. Graham having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said State of West Virginia citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now, the condition of the above obligation is such, That if the said James H. Graham shall prosecute said writ of error to effect, and answer all costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

JAMES H. GRAHAM. [SEAL.]
JAMES T. MILLER. [SEAL.]
JAMES D. PARRIOTT. [SEAL.]

Sealed and delivered in presence of—
R. M. AYERS.
JAMES F. SHIPMEN.
CHAS. A. SHOWALL.

Approved by—
EDWARD D. WHITE,
Chief Justice of the United States.

93 STATE OF WEST VIRGINIA,
Marshall County, to wit:

I, Victor E. Myers, Clerk of the Circuit Court of said Marshall county, do hereby certify that James T. Miller and James D. Parriott sureties named in the bond of James H. Graham hereto annexed, bearing date the 8th day of May, 1911, are good and sufficient surety of the penalty of the annexed bond.

Given under my hand and seal of said court affixed, at the Court House of said County, this 8th day of May, A. D. 1911.

[SEAL.] VICTOR E. MYERS,
Clerk of the Circuit Court.

Filed Jun- 16, 1911. Wm. B. Mathews, Clerk, Supreme Court of Appeals.

A true copy.
Attest:

WM. B. MATHEWS, *Clerk.*

94 In the Supreme Court of the United States, October Term, 1911.

No. 721.

JAMES H. GRAHAM, Plaintiff in Error,
vs.
STATE OF WEST VIRGINIA, Defendant in Error.

In Error to the Supreme Court of Appeals of the State of West Virginia.

Stipulation as to Printing Record.

It is this 4th day of August, 1911, hereby stipulated and agreed by and between the parties to this cause, by their respective attorneys, that only the hereinafter designated parts of the record herein are necessary for the consideration of the errors assigned, and that such parts only shall be printed for the hearing in this court:

1. Caption of cause.
2. Writ of error.
3. Citation and acceptance of service.
4. Return to writ of error.

95 5. Printed pages 7 to 19, both inclusive, and part of printed page 20 ending with exception to judgment.

6. Judgment of affirmance.
7. Opinion affirming judgment.
8. Petition for writ of error from the Supreme Court of the United States.

9. Assignment of errors on said petition.
10. Memorandum of approval and filing of bond in error.

FRANK J. HOGAN,
Attorney for Plaintiff in Error.
WM. G. CONLEY,
Attorney General, Attorney for Defendant in Error.
By J. O. HENSON,
Ass' Att'y Gen.

96 [Endorsed:] No. 721. 22797. James H. Graham, Plaintiff in Error, vs. State of West Virginia, Defendant in Error. Stipulation as to Printing Record. Baker, Sheehy & Hogan, Attorneys at Law, Evans Building, Washington, D. C.

97 [Endorsed:] File No. 22,797. Supreme Court U. S. October Term, 1911. Term No. 721. James H. Graham, Pl'ff in Error, vs. The State of West Virginia. Stipulation as to printing record. Filed August 9th, 1911.

Endorsed on cover: File No. 22,797. West Virginia Supreme Court of Appeals. Term No. 721. James H. Graham, plaintiff in error, vs. The State of West Virginia. Filed July 12th, 1911. File No. 22,797.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1911.

No. 721.

JAMES H. GRAHAM, *Plaintiff in Error,*

vs.

STATE OF WEST VIRGINIA, *Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

MOTION TO ADVANCE.

Comes here now James H. Graham, the plaintiff in error, by his counsel, and moves the court to advance this case, under Rule 26, section 3, for the reasons set down in the memorandum filed herewith, and in his brief on the merits filed herein January 2, 1912.

FRANK J. HOGAN,
EVERETT F. MOORE,
D. B. EVANS,
Attorneys for Plaintiff in Error.

MEMORANDUM.

This is a criminal case which comes up from the Supreme Court of Appeals of West Virginia. The plaintiff in error is and for some time has been confined in the State Penitentiary under the life sentence assailed as unconstitutional in this proceeding, and under no other sentence; so that, if his contentions are sound, he is day after day suffering wrongful imprisonment of the harshest kind.

The brief of the plaintiff in error on the merits was filed herein January 2, 1912; and for a statement of the matter involved, and further reasons for the application to advance, attention to it is respectfully invited in connection with the foregoing motion and this memorandum.

FRANK J. HOGAN,
EVERETT F. MOORE,
D. B. EVANS,
Attorneys for Plaintiff in Error.

MOUNDSVILLE, West Virginia, January 3, 1912.

NOTICE.

The State of West Virginia, defendant in error herein, will please take notice that the foregoing motion and memorandum will be presented and submitted to the court on Monday, January 29, 1912, at twelve o'clock meridian, or as soon thereafter as counsel can be heard.

FRANK J. HOGAN,
EVERETT F. MOORE,
D. B. EVANS,
Attorneys for Plaintiff in Error.

ACKNOWLEDGMENT.

The service of copies of the foregoing motion and memorandum, and of the plaintiff in error's brief on the merits herein, is hereby acknowledged, this day of January, 1912.

Attorney General of West Virginia.

IN THE

Supreme Court of the United States

October Term, 1911.

No. 721.

JAMES H. GRAHAM, Plaintiff in Error,

Vs.

STATE OF WEST VIRGINIA, Defendant in Error.

In Error to the Supreme Court of Appeals of the State of West Virginia

BRIEF FOR PLAINTIFF IN ERROR.

FRANK J. HOGAN,
EVERETT F. MOORE,
D. B. EVANS,
Attorneys for Plaintiff in Error.

IN THE

Supreme Court of the United States

October Term, 1911.

No. 721.

JAMES H. GRAHAM, Plaintiff in Error,

Vs.

STATE OF WEST VIRGINIA, Defendant in Error.

In Error to the Supreme Court of Appeals of the State of West Virginia

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BRIEF FOR PLAINTIFF IN ERROR.

I

STATEMENT OF CASE.

(a) Preliminary.

We premise that the instant case presents a phase of State legislation, relative to persons previously convicted of crimes, that is **res integra** in this court, and is therefore entirely out-

side of those aspects of such legislation which were considered in **Moore v. Missouri,** 159 U. S. 673, and **McDonald v. Massachusetts,** 180 U. S. 311.

The plaintiff in error (hereinafter called the defendant) is a citizen of the United States and a resident of the State of West Virginia, and is now confined in the penitentiary of said State under a sentence of imprisonment therein for life (Record 13), which sentence is predicated of a certain statute and of certain proceedings thereunder, which statute and proceedings are claimed to be repugnant to the Constitution of the United States.

(b) **The State Code and Constitution**

The Code of West Virginia, chapter 152, section 23, provides:

> "When any person is convicted of an offense and sentenced to confinement therefor in the penitentiary, and it is alleged in the indictment on which he is convicted, and admitted, or by the jury found, that he had been before sentenced in the United States to like punishment, he shall be sentenced to be confined five years in addition to the time which he is or would be otherwise sentenced."

Chapter 152, section 24, of said Code provides:

> "When any such convict shall have been twice before sentenced in the United States to confinement in a penitentiary, he shall be sentenced to be confined in the penitentiary for life."

The validity of these two sections is established by the **Moore** and **McDonald** cases, **supra,** except as to the requirement for life imprisonment.

The Code, chapter 165, section 1 to 5 inclusive, also pro-

vides:

"1. All criminal proceedings against convicts in the penitentiary shall be in the circuit court of the county of Marshall.

"2. When a prisoner convicted of an offense, and sentenced to confinement therefor in the penitentiary, is received therein, if he was before sentenced to a like punishment, and the record of his conviction does not show that he has been sentenced under the twenty-third or twenty-fourth section of chapter one hundred and fifty-two, the superintendent of the penitentiary shall give information thereof, without delay, to the said circuit court of the county of Marshall, whether it be alleged or not in the indictment on which he was so convicted, that he had been before sentenced to a like punishment.

"3. The said court shall cause the convict to be brought before it, and upon an information filed, setting forth the several records of conviction, and alleging the identity of the prisoner with the person named in each, shall require the convict named to say whether he is the same person or not.

"4. If he say he is not, or remain silent, his plea, or the fact of his silence, shall be entered of record, and a jury shall be empaneled to inquire whether the convict is the same person mentioned in the several records.

"5. If the jury find that he is not the same person, he shall be remanded to the penitentiary; but if they find that he is the same person, or if he acknowledge in open court, after being duly cautioned, that he is the same person, the court shall sentence him to such further confinement as is prescribed by chapter one hundred and fifty-two, on a second or third conviction, as the case may be."

We deny the validity of this statute, as repugnant to the federal Constitution; this question presents the main issue in this case; and it is based upon the grounds hereinafter set

down.

Article 3, section 4, of the constitution of West Virginia provides:

> "No person shall be held to answer for treason, felony, or other crime, not cognizable by a justice, unless on presentment or indictment of a grand jury."

Article 3, section 5, provides:

> "No person shall be twice put in jeopardy of life or liberty for the same offense."

Article 3, section 5, clause 2, provides:

> "Penalties shall be proportioned to the character and degree of the offense."

Article 3, section 5, reads in full as follows:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. Penalties shall be porportioned to the character and degree of the offence. No person shall be transported out of, or forced to leave the State for any offence committed within the same, nor shall any person, in any criminal case, be compelled to be a witness against himself, or be twice put in jeopardy of life or liberty for the same offense."

Article 3, section 14, clause 1, provides:

> "Trials of crimes and misdemeanors * * * shall be * * * in the county where the alleged offense was committed, * * * "

Article 3, section 14, also provides:

> "The accused shall be fully and plainly informed of

the character and cause of the accusation."

The Code of West Virginia, chap. 13, sec. 17 cl. 18 of construction provides:

> "The word 'offense' includes every act of omission for which a fine, forfeiture, or punishment is imposed by law."

The Code, chapter 152, section 1, also provides:

> "Offences are either felonies or misdemeanors. Such offences as are punishable with death or confinement in the penitentiary are felonies; all other offences are misdemeanors."

(c) The Federal Constitution.

The fourteenth amendment to the federal constitution provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No state shall make or enforce any law which shall abridg the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." ...

The fifth amendment declares that:—

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be

twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The sixth amendment and the constitution of West Virginia guarantees the accused the right to be tried only where the alleged crime was committed, and to be informed of the nature and cause of the accusation.

The eighth amendment reads:—

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

(d) The Facts.

With the above quoted provisions of the State constitution and code in full force and effect, on February 11, 1908, the prosecuting attorney for Marshall County, West Virginia, in which County, at Moundsville, is located the West Virginia Penitentiary, filed in the circuit court of said County an information (Record 3-10), without oath, against the plaintiff in error, in which it was alleged in substance:

A. That in the circuit court of Pocohontas County, West Virginia, on April 6, 1898, the defendant was convicted of larceny on an indictment therefor, and was sentenced to confinement in the said penitentiary for two years.

B. That after the defendant served said sentence, in the circuit court of Mineral County, West Virginia, on April 23, 1901, he was convicted of burglary on an indictment therefor, which also alleged said former conviction, and on April 24, 1901, he was sentenced to confinement in the said penitentiary for ten years;

that the minimum sentence for said offence was five years, so that the said ten year sentence included the five years additional time required by the aforesaid provision of chapter 152, section 23, of the Code of West Virginia.

C. That while on parole under said second sentence, in the circuit court of Wood County, West Virginia, on September 13, 1907, the defendant was convicted of larceny on an indictment therefor, and was sentenced to confinement in the said penitentiary for five years; but this indictment did not allege either or both of the former convictions.

On February 24, 1908, the defendant moved to quash (Record 11) said information, but his motion was denied (Record 11); and he then pleaded (Record 11) the only defense allowed by said statute, namely, that he is not the same person named in the records recited in said information; on which plea issue was joined (Record 11) and tried to a jury (Record 11), which found (Record 11-12) said single point in issue against the defendant; the defendant then moved the said court to set aside the verdict and grant a new trial (Record 12), because the verdict was contrary to the law and evidence (Record 12), which motion was overruled (Record 12); thereupon the defendant moved the said court to arrest judgment (Record 12-13) on said verdict, because among other reasons, the said proceeding by information was:—

> "in conflict with and prohibited by the 5th and 14th Articles of Amendment to the Constitution of the United States, and is therefore void,"—

which motion was also denied (Record 13); and thereupon the said court, on June 8, 1908, entered the following judgment (Record 13):

> "Thereupon, it appearing to the court from the verdict and finding of the jury in this case that the said

> J. H. Graham has been three times convicted of felony in this State and sentenced therefore three times to the penitentiary of this State, it is by the court ordered that the said J. H. Graham be sentenced to confinement in the penitentiary of this State for the period of his natural life."

On July 22, 1909, the defendant was duly allowed (Transcript 6(a writ of error from the Supreme Court of Appeals of West Virginia to the said circuit court of Marshall County, to review the said life sentence, on his petition for such writ (Transcript 1), assigning, among other errors (Transcript 4), that (Record 21-22)—

> "The court erred in holding that the statute, under which this proceeding was had, is not in conflict with so much of the fifth (5) Article of Amendment to the Constitution of the United States as provides that 'No person shall be held to answer for a capital or other infamous crime, unless on a presentment or indict- of a grand jury.'
>
> "The court erred in holding that the statute under which this proceeding was had is not in conflict with and prohibited by so much of the Fourteenth (14) Article of Amendment to the Constitution of the United States as provides as follows: 'Nor shall any State deprive any person of life, liberty, or property, without due process of law.'
>
> "The court erred in refusing your petitioner's motion in arrest of judgment and not discharging him."

On November 22, 1910, the said Supreme Court of Appeals of West Virginia, which is the highest court of the State in which a decision in this suit can be had, affirmed the said life sentence in all things (Record 13), in an opinion (Record 14-18) by the president Judge of said court, in which the said Court decided, according to the syllabi prepared by the said Court itself (Record 13-14), that—

"1. The provisions of Code 1906, chapter 165, sections 1 to 5 inclusive, pursuant to which, by an information in the circuit court of the county in which the penitentiary is situated, there may be imposed the additional sentence provided by law upon a convict who once or twice before has been convicted and sentenced to a penitentiary, are not violative of any constitutional guaranty.'

"2. By proceedings under the statute mentioned, the convict is not held to answer for a crime so as to require presentment or indictment of a grand jury, nor is he thereby twice put in jeopardy for an offense."

In the said courts the defendant, in the manner above stated, specially set up and claimed his immunity under the federal constitution not to be held to answer the offence alleged in the information unless on a presentment or indictment of a grand jury; and he also specially set up and claimed his immunity under the federal constitution from double jeopardy and double punishment for the offence alleged; and he also specially set up and claimed that the said statute is repugnant to the fourteenth amendment to the federal constitution (and the fifth amendment, if made applicable to the States by the fourteenth amendment), in that the said statute denies him certain privileges and immunities to which he is entitled as a citizen of the United States, and deprives him of his liberty and property without due process of law, and denies him the equal protection of the laws, in the respects hereinafter particularly set forth; all of which federal questions were decided against the defendant, and the said decision of the said Supreme Court of Appeals of West Virginia was in favor of the validity of said statute, and was against the said privileges and immunities specially set up and claimed by the defendant under the constitution of the United States.

Thereafter the defendant duly prayed the said court and the said President Judge thereof to grant him a writ of error from the Supreme Court of the United States to review the said judgment affirming the said sentence, but such writ

of error was denied on February 21, 1911, by the said court and the said President Judge thereof (Transcript 68).

Thereupon the defendant presented to the Honorable Chief Justice of the United States a petition (Record 18-25), for a writ of error to the said Supreme Court of Appeals, which petition was accompanied by an assignment of errors (Record 26-29); the writ of error was allowed (Record 1), citation was signed and served (Record 1-2), bond in error (Record 29-30) was approved and filed, and the record was sent up (Record 2) to this court.

At this time, the defendant is confined in the said penitentiary under the sentence involved in this case, and none other.

II

SPECIFICATION OF ERRORS.

The assignment of errors appears in full in the record on pages 26 to 29 inclusive; and the following are now specified (and hereinafter particularized):

1. The court erred in holding that the defendant is not denied the equal protection of the laws.
2. The court erred in holding that the defendant is not deprived of his liberty and property without due process of law.
3. The court erred in holding that the defendant's privileges and immunities as a citizen of the United States are not abridged, and that he is not denied his immunity from double jeopardy.
4. The court erred in holding that cruel and unusual punishment is not inflicted on the defendant.

III

BRIEF OF ARGUMENT.

First Specification of Error.

Equal Protection of the Laws.

It is contended that the defendant is a person within the jurisdiction of the State of West Virginia, and is **denied by the said State the equal protection of the laws** in that—

A. The said statute arbitrarily discriminates among persons in the same class and condition, in this: The State constitution (Article 3, section 4), read in conjunction with the Code (Chapter 152, section 1, and Rule 18 of Construction, in

Chap. 13, sec 17, of the Code), in effect declares all acts or omissions punishable by confinement in the penitentiary to be felonies, and requires them to be prosecuted "on presentment or indictment of a grand jury"; section 23 and 24 of chapter 152 of the Code (expressly mentioned in section 2 of chapter 165) require prior conviction or convictions to be "alleged in the indictment on which he (the defendant) is convicted"; but if the defendant has been convicted and received into the penitentiary without having been sentenced under said section 23 or 24, "whether it be alleged or not in the indictment on which he was so convicted, that he had been before sentenced to a like punishment (confinement in the penitentiary)", then, **and for the sole and single reason that he has been received into the penitentiary,** this statute denies an indictment and requires an information; so that if he be out of the penitentiary, the defendant must be prosecuted by indictment in order to inflict the increased penalty, but if he be in the penitentiary, he is denied the right to indictment and must be prosecuted by information; and this presents the palpably arbitrary and unequal effect of putting two men into the same cell in the same penitentiary, both of whom are under life sentence for their status produced by the third conviction of each, the life sentence of one being imposed on an indictment as required by the constitution and said sections 23 and 24 of chapter 152, and the life sentence of the other being imposed on an information without oath as required by said section 2 of chapter 165, despite the constitutional requirement for an indictment as the exclusive basis for any punishment by confinement in the penitentiary; the former prisoner being accorded the constitutional and statutory protection of a grand jury and its indictment, the latter being denied the equal protection of the constitution and laws in this respect, in that, without any reasonable cause for such discrimination, and although the latter is in exactly the same class and condition as the former, he is denied the protection of a grand jury and its indictment, but is accorded an unsworn information only; the right to an indictment being one not of form but one that is substantial and fundamental under the state constitution, since it is expressly demanded and not denied

thereby, and therefore such right is one to which all similarly situated persons in the State are equally entitled under the state constitution and laws, the equal protection of which no such person can be arbitrarily denied without violating the provisions of the fourteenth amendment to the federal constitution; to which is added the correlative contention that as the said statute expressly provides that even if the indictment alleges the prior conviction or convictions, but the record of his conviction does not show that the accused has been sentenced under section 23 or 24 of chapter 152 of the code, he shall after he has been received into the penitentiary, **and for this reason only,** be proceeded against by information in Marshall county, despite the pendency, in another county, of an indictment alleging the prior conviction or convictions which indictment is demanded and required both by the State constitution and sections 23 and 24 of said statute; so that the said statute denies even one and the same person the equal protection of the laws, in that if he be out of the penitentiary he is entitled as of right to the protection of the grand jury and its indictment returned and pending against him, but if he be in the prison this right is **ipso facto** taken arbitrarily from him and is replaced by the right to an information only, presenting and permitting the single issue of identity of person; and although the State constitution may take away the immunity from being held to answer for an infamous crime unless on presentment or indictment of a grand jury, yet as it not only does not do so but affirmatively provides that—

> "No person shall be held to answer for treason, felony, or other crime, not cognizable by a justice, unless on presentment or indictment of a grand jury,"—

the aforesaid statute, requiring prosecutions under it to be by information, is repugnant not only to the State but also to the federal constitution, for the reasons set forth.

B. The said statute requires the said prosecution against him to be by information, and the sentence to be to the penitentiary for life, whereas the constitution and laws of said

State (except only this statute) require all acts or omissions punishable by imprisonment in the penitentiary to be prosecuted and punished "on a presentment or indictment of a grand jury", and not otherwise.

C. The said statute requires the said prosecution against him to be in the circuit court of Marshall County, West Virginia, although the three alleged convictions were had in other courts in other counties, and requires the said circuit court of Marshall County to sentence him to imprisonment in the penitentiary for life, whereas the constitution and laws of the said State (except only this statute) require that trials of crimes and misdemeanors shall be "in the county where the alleged offense was committed", the word "offence,, is defined by the aforesaid statute of the said State to include every act or omission for which a fine, forfeiture, or punishment is imposed by law, offenses are likewise defined as either felonies or misdemeanors, and such offenses as are punishable with death or confinement in the penitentiary are felonies, and all other offences are misdemeanors.

D. The laws of said State (except only this statute) require in all cases involving prior convictions that they shall be alleged in the indictment for the subsequent offence, and shall be proved in that case, and not otherwise, or the sentence therefor shall be void,

E. The constitution and laws of said State (except only this statute) requires that "penalties shall be proportioned to the character and degree of the offense", yet the first alleged conviction of your petitioner was for larceny, the second for burglary, and the third for larceny, the penalty for each of which offenses was proportioned to the character and degree thereof and was suffered therefor, and now for the mere status produced by such convictions this statute subjects him to imprisonment in the penitentiary for life; and this penalty is disproportionate "to the character and degree of the offense", as "offense" is defined as aforesaid by the laws of the said State.

In **Hodgson v. Vermont,** 168 U. S. 262, the court says (272-273):

> "We concede the proposition, so earnestly urged on behalf of the plaintiff in error, that by the Fourteenth Amendment it is made the right and the consequent duty of this court, when a case has been duly brought before it, to inquire whether, in the enactment and administration of the criminal laws of a State, it is sought to arbitrarily deprive any person of his life, liberty, or property, or to refuse him the equal protection of the laws, and that such inquiry is not precluded or ended by the mere fact that the judgment complained of was reached by proceedings in a state court in pursuance of the provisions of a state statute. But we are contented to close this discussion by quoting the language of this court in **Ex parte Converse,** 137 U. S. 624: 'We repeat, as so often has been said before, that the Fourteenth Amendment undoubtedly forbids any arbitrary deprivation of life, liberty, or property, and in the administration of criminal justice requires that no different or higher punishment shall be imposed on one than is imposed on all for like offenses, * * * ."

In **Bowman v. Lewis,** 101 U. S. 22-33, the court used the words quoted below almost prophetically considering that the statute now in question creates a distinct territorial establishment and jurisdiction intended to have and actually having the effect of operating arbitrary discrimination against a particular class of persons, namely, those prisoners in the penitentiary who, like the defendant, were not supersentenced before they were received into the penitentiary, and the words above referred to are these:

> "It is not impossible that a distinct territorial establishment and jurisdiction might be intended as or might have the effect of a discrimination against a particular race or class, where such race or class should happen to be the principal occupants of the disfavored district. Should such a case ever arise, it will be time enough then to consider it, * * * ."

In the case of **In re Lowrie,** 8 Col. 499, 54 Am. **Rep. 558** the court held that admitting the power of the legislature to abolish the grand jury system, yet a statute of Colorado providing for its abolition and the substitution of the proceeding by information as to certain of the criminal courts of the State, but not as to the other courts, contravenes the fourteenth amendment to the Constitution of the United States, prohibiting any state from denying to any person within its jurisdiction the equal protection of its laws.

In no other court of the state of West Virginia except the circuit court of Marshall County can a defendant be prosecuted by information for former convictions; but in every other court of the State the presentment or indictment of a grand jury is imperatively required.

The instant case, we think, falls fairly within the principles reiterated in **Connolly v. Union Sewer Pipe Co.,** 184 U. S. 540, in which this court says (556):

> "The vital question, however, is whether the statute of Illinois of 1893 is not inconsistent with the constitution of the United States, by reason of the fact that by the ninth section it declares that 'the provisions of this act shall not apply to agricultural products or live stock while in the hands of the producer or raiser.' The Circuit Court held this section to be repugnant to the Fourteenth Amendment of the Constitution of the United States, and to be so connected and interwoven with other sections that its invalidity affected the entire act."

After an analysis of the state statute in question (556-557), the court inquires (557):

> " * * * * Is not this such discrimination against those engaged in business (other than the sale of agricultural products and live stock in the hands of producers and raisers) as is forbidden by that clause of the Fourteenth Amendment which declares that 'no

State shall * * * deny to any person within its jurisdiction the equal protection of the laws."

The court then considers section 26 of the state statute relative to foreign corporations (557-558), and proceeds as follows 558-561):

"But the question remains to be decided whether the statute is repugnant to the constitution of the United States. If it be, then it is not law and can not be applied for the purpose of defeating the plaintiff's claims in these actions.

"The question of constitutional law to which we have referred cannot be disposed of by saying that the statute in question may be referred to what are called the police powers of the State, which, as often stated by this court were not included in grants of power to the General Government, and therefore were reserved to the States when the constitution was ordained. But as the constitution of the United States is the supreme law of the land, anything in the Constitution or statutes of the States to the contrary notwithstanding, a statute of a State, even when avowedly enacted in the exercise of its police powers, must yield to that law. No right granted or secured by the constitution of the United States can be impaired or destroyed by a state enactment, whatever may be the source from which the power to pass such enactment may have been derived. 'The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law.' The state has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health and the public safety, but if, by their necessary operation, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void. **Gibbons v. Ogden,** 9 Wheat. 1, 210; **Sinnot v. Davenport,** 22 How. 227, 243; **Missouri, Kansas & Texas Railway** v.

Haber, 169 U. S. 613, 626.

"What may be regarded as a denial of the equal protection of the laws is a question not always easily determined, as the decisions of the highest courts of the States will show. It is sometimes difficult to show that a state enactment, having its source in a power not controverted, infringes rights protected by the National Constitution. No rule can be formulated that will cover every case. But upon this general question we have said that the guarantee of the equal protection of the law means 'that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and in like circumstances.' **Missouri v. Lewis,** 101 U. S. 22, 31. We have also said: 'The Fourteenth Amendment, in declaring that no State 'shall deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoymemnt of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offences'. **Barbier v. Connolly,** 113 U. S. 27, 31. This language was cited with approval in **Yick Wo v. Hopkins,** 118 U. S. 356, 369, in which it was

also said that 'the equal protection of the laws is a pledge of the protection of equal laws.' In **Hayes v. Missouri**, 120 U. S. 68, 71, we said that the Fourteenth Amendment required that all persons subject to legislation limited as to the objects to which it is directed, or by the territory within which it is to operate, 'shall be treated alike, under like circumstances and considerations, both in the privileges conferred, and in the limitations imposed.' 'Due process of law and the equal protection of the laws,' this court has said, 'are secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government., **Duncan v. Missouri**, 152 U. S. 377, 382. Many other cases in this court are to the like effect.

" * * * * * * * *

"The difficulty is not met by saying that, generally speaking, the State, when enacting laws may, in its discretion, make a classification of persons, firms, corporations and associations, in order to subserve public objects. For this court has held that classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. * * * But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. * * * No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government. * * * It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection.' **Gulf, Colorado and**

Sante Fe Railway v. Ellis, 165 U. S. 150, 155 159, 160, 165. These principles were recognized and applied in **Cotting v. Kansas City Stock Yards Co.,** 183 U. S. 79, in which it was unanimously agreed that a statute of Kansas regulating the charges of a particular stock yards company in the state, but which exempted certain stock yards from its operation, was repugnant to the Fourteenth Amendment in that it denied to that company the equal protection of the laws."

Comparing tax laws with trade laws, the court says (562-563):

" • • • A state may in its wisdom classify property for purposes of taxation, and the exercise of its discretion is not to be questioned in a court of the United States, so long as the classification does not invade rights secured by the Constitution of the United States. But different considerations control when the State, by legislation seeks to regulate the enjoyment of rights and the pursuit of callings connected with domestic trade. In prescribing regulations for the conduct of trade, it cannot divide those engaged in trade into classes and make criminals of one class if they do certain forbidden things, while allowing another and favored class engaged in the same domestic trade to do the same things with impunity. It is one thing to exert the power of taxation so as to meet the expenses of government, and at the same time, indirectly, to build up or protect particular interests or industries. It is quite a different thing for the State, under its general police power, to enter the domain of trade or commerce, and discriminate against some by declaring that particular classes within its jurisdiction shall be exempt from the operation of a general statute making it criminal to do certain things connected with domestic trade or commerce. Such a statute is not a legitimate exercise of the power of classification, rests upon no reasonable basis, is purely arbitrary, and plainly denies the equal

protection of the laws to those against whom it discriminates.

"We must not be understood by what has been said as conceding that the question of a denial of the equal protection of the laws can never rise under the taxing statutes of a State. On the contrary, the power to tax is so far limited that it cannot be used to impair or destroy rights that are given or secured by the supreme law of the land. We only need to say in this connection that the constitutional validity of the statute of Illinois now before us is not necessarily to be determined by the same principles that apply to taxing laws."

Concluding this phase of the case, the court ends thus (564):

"We conclude this part of the discussion by saying that to declare that some of the class engaged in domestic trade or commerce shall be deemed criminals if they violate the regulations prescribed by the State for the purpose of protecting the public against illegal combinations formed to destroy competition and to control prices, and that others of the same class shall not be bound to regard those regulations, but may combine their capital, skill or acts to destroy competition and to control prices for their special benefit, is so manifestly a denial of equal protection of the laws that further or extended argument to establish that position would seem unnecessary.

"We therefore hold that the act of 1893 is repugnant to the constitution of the United States, unless its ninth section can be eliminated, leaving the rest of the act in operation.

The court then considers (565) the question whether the invalidity of the ninth section destroys the entire act, and expresses the result as follows (565):

"Looking then at all the sections together, we must hold that the legislature would not have entered upon or continued the policy indicated by the statute unless agriculturalists and live stock dealers were excluded from its operation and thereby protected from prosecution. The result is that the statute must be regarded as an entirety, and in that view it must be adjudged to be unconstitutional as denying the equal protection of the laws to those within its jurisdiction who are not embraced by the ninth section.

"Whether it is also within the prohibition against the deprivation of property without due process of law, is a question which it is unnecessary to consider at this time."

Applying the principles of the **Connelly** case to that at bar we think that the West Virginia statute now in question denies the defendant the equal protection of the laws in the respects and for the reasons which we have already mentioned; and in that each section of the statute is so connected and interwoven with the other sections, we also think the invalidity of any one section destroys the entire act.

In **Caldwell v. Texas,** 137 U. S. 692, 697, 698, the court says that no State can deprive particular persons or classes of persons of equal and impartial justice under the law; nor can it subject the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice; the laws must operate on all alike; and the exertion of the power of the state can not be sustained when special, partial, and arbitrary.

In **State v. Lewin,** 53 Kan. 697, the court held that a statute of Kansas providing that when a prisoner shall be convicted of escaping from the State penitentiary he shall be sentenced to confinement therein for the full term which he was serving when he escaped, without any allowance for the time already served, violates that provision of the Constitution which guarantees to all individuals the equal protection of the laws.

In **Budd v. State,** 22 Tenn. 483, 39, Am. Dec. 189, it was held that a statute of Tennessee declaring the embezzlement or misappropriation of funds by the officers of a particular bank a felony, is unconstitutional and void, as being partial in in its operation, not embracing all persons in like situations.

In **Rogers v. Alabama,** 192 U. S. 226, the court holds that if, by the ruling of a state court, an accused person of the African race is denied the same kind and composition of a grand jury that is accorded white persons in the same situation or circumstances, he is denied the equal protection of the laws, in violation of the fourteenth amendment.

In **Bell's Gap Railroad v. Pennsylvania,** 134 U. S., 232, the court says (237):

> "Clear and hostile discriminations against particular persons and classes, especially such as are of unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition."

In **Gulf, Colorado & Santa Fe Railway v. Ellis,** 165 U. S. 150, the court says (165):

> "It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection."

In **Magou v. Illinois Trust & Savings Bank,** 170 U. S. 283, the court says (293, 295):

> " * * * The clause of the Fourteenth Amendment especially invoked is that which prohibits a State denying to any citizen the equal protection of the laws.

> What satisfies this equality has not been and probably never can be precisely defined." * * * * * * * * * * * * * * * charging a railroad corporation and not other corporations or persons with an attorney's fee has been held unreasonable. * * * "

In the case of **Cotting v. Kansas City Stock Yards Company,** 183 U. S. 79, 100-112, the equal protection clause of the fourteenth amendment is elaborated, the cases are reviewed at length, and the court concludes thus (112):

> " * * * * This statute is not simply legislation which in its indirect results affects different individuals or corporations differently, nor with those in which a classification is based upon inherent differences in the character of the business, but is a positive and direct discrimination between persons engaged in the same class of business and based simply upon the quantity of business which each may do. If such legislation does not deny the equal protection of the laws, we are unable to perceive what legislation would. We think therefore that the principle of the decision of the Supreme Court of Kansas in **State v. Haun,** supra, is not only sound, but is controlling in this case, and that the statute must be held unconstitutional, as in conflict with the equal protection clause of the Fourteenth Amendment."

So, in the case at bar, the statute is a positive and direct discrimination between persons in exactly the same class,—those who have suffered former convictions,—based simply upon the fact that the prisoner is in the penitentiary. If he be indicted and convicted of a felony in the circuit court of Marshall County (in which County the penitentiary is located), and be sentenced to the penitentiary, and be held temporarily in the county jail in Moundsville (the county seat) two blocks distant from the penitentiary, he can not be proceeded against or sentenced for former conviction or convictions unless on the presentment or indictment of the grand

jury, alleging such former conviction or convictions; but if he be taken a little way up the street, and be received into the penitentiary, then **ipso facto** he may be immediately proceeded against and again sentenced to the penitentiary for such former conviction or convictions, by information in the same court which a few moments before had no such power.

In the case of **In re Landford,** 57 Fed. 570, the court held that a provision of the South Carolina Dispensary Act prohibiting any railroad employee from removing intoxicating liquors from any railroad car at any place where there is not a dispensary, is in conflict with the fourteenth amendment of the Federal Constitution, since it discriminates against railroad employees in that it does not require that the liquors are for illegal sale as in the case of all other persons prohibited from handling such liquors.

The court says (574) that in every subdivision of the act but the second, there must exist on the part of the persons charged the knowledge that the intoxicating liquors were intended for sale; no criminality is attached to the person receiving from the common carrier the liquors mentioned in the section assailed, but it makes it a criminal offense for one special class of persons, servants, employees, and agents of a a special class of common carriers to remove from the car any intoxicating liquor whatever, without any sort of qualification; no knowledge on the part of such servant, agent, or employee that it is intoxicating liquor is required; nor does it make any difference whether the liquor be intended for sale personal use, or consumption in any other way; none of the safeguards thrown around every other criminal offense exists; the only qualification is that the city or town in which the package is has no dispensary; this is discrimination,—the separation of a class from the whole community, and singling it out for prosecution and punishment; the inference from the words of the act is that a motive for this discrimination is the intention to prevent any possible chance of competition with dispensaries elsewhere established, an intention sought to be perfected not by punishing all persons connected with the act,—the importer and the consumer,—but confining the crime

and the punishment to this one class, and creating for this special class a new crime; if this be assumed to have been done in the exercise of the police power, it will be difficult to sustain it; the most broad and liberal construction of the Wilson Act would not permit a state, under the guise of the police power, to single out and punish the agents of interstate commerce for a crime specially created for them, in the teeth of the fourteenth amendment to the Constitution of the United States; and the court adds (575):

> "It is extremely difficult, if not impossible, to give an exact definition of, and to describe the limits of, the police power. It is clear, however, that the legislature of a state cannot assume the exercise of the police power in a way forbidden by the constitution of the state. The constitution of South Carolina, (article 1, sec. 12,) provides 'no person shall * * * * be liable to any other punishment for any offense, or be subjected in law to any other restraints or disqualifications in regard to any personal rights than such as are laid upon others under like circumstances.' This limits the power of the legislature, and prevents this provision of the act of 1892, known as the 'Dispensary Act,' from being an exercise of the police power. This being so, the provisions of the twenty-fifth section under this act contravene the interstate comerce law and the fourteenth amendment, (Leeper v. Texas, 139 U. S. 463, 11 Sup. Ct. Rep. 577; Missouri v. Lewis, 101 U. S. 22,) and are null and void. The arrest of the petitioner, based on these provisions, is void."

The case at bar was decided November 22, 1910; and, as tending to emphasize the proposition that the statute now in question violates the equality clause of the federal constition, we now call attention to **Sate of West Virginia v. Davis,** 69, S. E. 639, 32 L. R. A. 501, decided by the same court November 15, 1910,—exactly one week prior to this case. In the **Davis** case the defendant was convicted of an illegal sale of liquor as a druggist, and brought error. The statute

on which that case was predicated (W. Va. Code, Ch. 32, Sec. 5) reads as folows:

> "If any druggist shall sell spirituous liquors, wine porter, ale, beer, or other intoxicating liquors, unless for medicinal purposes, or alcohol unless for medicinal, scientific or mechanical purposes, he shall for each and every offence not less than fifty nor more than two hundred dollars; and he shall upon a second conviction be fined not less than one hundred nor more than five hundred dollars, and may, in the discretion of the court, be imprisoned in the county jail not less than thirty nor more than ninety days, and the court wherein such conviction is had may revoke the license of such person to carry on the business of a druggist and registered pharmacist; and no license shall thereafter be granted to such person or to any person in his employ; and it shall be the special duty of the circuit court to give this provision in charge to every grand jury."

The defendant Davis, a licensed druggist in the town of Phillipi, was indicted and convicted for making an unlawful sale of spirituous liquors, as we have said, and the court proceeding on the theory that it was a second conviction, adjudged him to pay a fine of $500., sentenced him to be confined in the county jail 30 days and revoked his license. The supreme court of appeals held that in order to warrant the imposition of the increased penalty for a second conviction, under the statute, a former conviction must have been alleged in the indictment, and also proven; and in announcing this conclusion the court said (643):

> "This brings to us a consideration of the court's judgment rendered on the verdict. The severe judgment was rendered, pursuant to section 5 of chapter 32, Code, on the theory that defendant had been convicted of a second offence. **The indictment, however, does not allege that defendant had been previously convicted of a like offence.** But the court's order contains the following recital, viz.: 'And it being made to appear to the court that there was a former conviction

of the defendant at a former day of this court,' etc. But how it was made to appear is not shown by the record. The judge certifies that the transcript contains 'all the evidence adduced upon the trial,' and it contains no proof of a former conviction; **neither can we see how a former conviction could have been properly proven, as there is no such allegation in the indictment.** There is no pleading on which to base such proof, if it had been offered. **The matter of a former conviction is an essential part of the indistment It must be alleged and proven** by the record, if not admitted by the defendant's plea, in order to warrant a judgment for a second conviction. The court could not take judicial notice of a former conviction as was apparently done in this case even though such former conviction may have been had in the same court, and on a previous day of the term at which the present trial was had. **Pickens v. Boom Co.,** 66 W. Va. 10, 65 S. E. 865, 24 L. R. A. (N. S.) 354; **United States v. Bliss,** 172 U. S. 326, 19 Sup. Ct. 216 43 L. Ed. 463. **Defendant was entitled** Sup. Ct. 216, 43 L. Ed. 463. **Defendant was entitled to be informed by the indictment of the matter with which he was charged. It did not charge him with a previous conviction but only with a single unlawful sale.**

"The following authorities and decisions hold that the indictment must allege the first conviction, before the added penalty can be imposed; some of them go so far as to hold that the second offence must be shown to have been commited after the first conviction, on the theory that, if the first penalty does not work a reformation of conduct in the guilty party, and he thereafter commits a second offence, he should be then dealt with more severely. But it is unnecessary for us to decide whether it is necessary that the former conviction should have been had before the commission of the second offence, as this point does not arise in this case. We therefore simply hold that it was error for the court to take judicial notice of a former con-

viction, and that, in order to admit proof of a former conviction, it must be alleged in the indictment. **Rand v. Commonwealth,** 9 Grat. (Va.) 738; **People v. Butler,** 3 Cow. (N. Y.) 347; **Maguire v. State,** 47 Md. 485; 1 Bish. Crim. Law, Sec. 961; **Rex. v. Allen,** Russ. & R. 513; **Reg. v. Page,** 9 Car. & P. 756; **Wilde v. Commonwealth,** 2 Metc. (Mass.) 408; **Plumbly v. Commonwealth,** 2 Metc. (Mass.) 413; **Commonwealth v. Welsh,** 2 Va. Cas. 57; **Long v. State,** 36 Tex. 6; **Garvey v. Commonwealth,** 8 Gray (Mass.) 382; **Walters v. State,** 5 Iowa, 507; **Smith v. Commonwealth,** 14 Serg. & R. (Pa.) 69; **Kane v. Commonwealth, 109 Pa. 541.**

"The judge should have rendered his judgment upon the verdict, as for a single offence. Section 5 of chapter 32, Code 1906, fixes the penalty in such case at a fine of not less than $50. nor more than $200."

Thus the laws of West Virginia discriminate against Graham, so as to put him into the penitentiary for life on an unsworn information, simply because he was in the prison, and in favor of Davis, so as to keep him out of the county jail, unless on indictment alleging and proof showing a former conviction. If the Davis sentence of a fine of $500. and thirty days confinement in the county jail, and the revocation of his license was "the severe judgment which the court says it was, what is to be said of its affirmation of Graham's sentence to life imprisonment in the penitentiary on an unsworn information? The laws of the State should give Graham protection equal to that given Davis, unless reason is to be replaced by caprice and the fourteenth amendment is to be ignored.

Davis was held absolutely entitled to an indictment alleging, and proof showing, his former conviction, and in no other way could the increased penalty be imposed upon him; but Graham was held not entitled to an indictment, but could be summarily imprisoned for life on a mere information, simply because he was in prison. The law arbitrarily singles out persons in Graham's class, and makes an unreasonable

and harsh rule for them alone.

Second Specification of Error

Due Process of Law

It is further contended that the defendant is deprived of his liberty and property by the State of West Virginia without due process of the law in that—

A. Since the State constitution affirmatively demands and does not deny the presentment or indictment of a grand jury as the esclusive basis for any punishment by confinement in the penitentiary, such presentment or indictment is an expressly declared, essential, and necessary element of due process of law in the State; and therefor the said statute which requires the imprisonment of the defendant in the penitentiary for life under the sentence imposed on him on an unsworn information operates a deprivation of his liberty without due proces of law, and is for this reason repugnant to the fourteenth amendment to the federal constitution; and this aspect of the instant case is not controlled by **Hurtado v. California,** 110 U. S. 516, in which the State constitution affirmatively denied a presentment or indictment but gave an information, and the question was whether the State had the power so to provide without violating the due process of law clause of the fourteenth amendment to the federal constitution, and it was held that the State had such power.

B. The said statute requires, and there has been inflicted on the defendant, a sentence of confinement for life in the penitentiary, for what said statute in effect independently defines and declares to be a mere status, and nothing else, notwithstanding the Supreme Court of Appeals says (Record 16, 17) that, "Our law does not make it an offence or crime for one to have ben convicted more than once. • • • It does not prosecute and punish for the former conviction. **It cannot do that;**" so that the prosecution and life punishment of the defendant under said statute, which is independent of and separate and distinct from said sections 23 and 24 is for an unknown and unknowable, undefined and undefin-

able, something or nothing of omission or commission; and this is a deprivation of the defendant's liberty without informing him of the nature and cause of an accusation against him, without making any accusation against him, and without due proces of law, in violation of the fourteenth amendment to the federal constitution.

C. The said statute conclusively presumes the fact and validity of the alleged prior convictions and concludes every defense against the defendant except only that of non-identity.

D. The said statute requires prosecution by information, and the defendant was prosecuted and sentenced as aforesaid by information without oath, for what the constitution and laws of the said State and of the United States define as an infamous crime and an offence which is a felony, and punishable by imprisonment in the penitentiary for life.

An act of Congress declaring that all suspicious persons can be arested and prosecuted as criminals, and on conviction be fined and imprisoned, is unconstitutional and void, because the mere status of one who is a suspicious person can not be made a crime. **Stoutenburg v. Frazier,** 16 App. D. C. 229, 235-236, per Alvey, C. J. Invasions of those fundamental individual rights which lie at the foundation of the social compact, and for the maintenance of which free governments exist, are not lawful subjects of legislation. **Curry v. District of Columbia,** 14 App. 423, 439; **Lappin v. District of Columbia,** 22 App. D. C. 68, 77.

In order to warant the defendant's sentence to life imprisonment in the penitentiary, he must have been charged wnth some offence,—that is, some "act or omission for which a fine, forfeiture, or punishment is imposed by law", to use the language of the code of West Virginia, chap. 13, sec. 17, cl. 18; but, on turning to the information against him (Record 3-10), we find that,, following the statute assailed, it charges a mere status of the defendant, and nothing more,—a status effected solely by his prior convictions; it charges him with no act or omission for which a fine, forfeiture, or punishment is imposed by law; the statute dispenses with any such charge; so that whatever may be said as to the right and power of the State to charge former convictions in the indictment, to

orove them, and thereupon to inflict an increased penalty in the original prosecution for the distinct substantive offence involved, nevertheless, in the case at bar, this separate and distinct statute now assailed, involving a mere charge of status and not of crime or offence, is not due process of law. If Congress can not make the status of a suspicious person a substantive offence, the State can not make the status of a convict a substantive offence, without violating the federal constitution.

We have seen that the courtbelow expressly holds (Record 16, 17) in the case at bar that it is not an offence or crime for one to have been convicted more than once, and that the State not only does not but can not prosecute or punish for the former convictions. Since, then, the mere status of a twice or thrice pre-convicted prisoner is not an offence or crime; since the State does not prosecute or punish for the former convictions;since the state can not do that; and since under the constitution and laws of West Virginia no person can be imprisoned in the penitentiary except for an offence; what is the legal foundation for the defendant's superimposed sentence of life imprisonment in the penitentiary? What is it that constitutes due process of law for the deprivation of his liberty? The statute under which Graham was prosecuted by unsworn information, and sentenced to life imprisonment in the penitentiary, seems to overreach by far the due process of law clause of the fourteenth amendment, however much the court below may think it comports with the state constitution. It is not unreasonable to insist that the defendant shall be charged with, and convicted of, something criminal before he can lawfully be sentenced to imprisonment in the penitentiary for life.

The **Davis** case also shows that former convictions or the status effected thereby is not a crime or offence, and can not be prosecuted or punished as such, in West Virginia, for in that case the court says:

> " * * * The matter of a former conviction is an essential part of the indictment. It must be al-

> leged and proven by the record, if not admitted by the defendant's plea, in order to warrant a judgment for a second conviction. * * * Defendant was entitled to be informed by the indictment of the matter with which he was charged. It did not charge him with a previous conviction, but ouly with a single unlawful sale."

The constitution and laws of West Virginia, as we have seen, declare anything punishable by imprisonment in the penitentiary to be an infamous crime and an offence which is a felony; and this court has often said that any offence which may be punished by confinement in the penitentiary is an infamous crime, so as to require indictment under the federal constitution. The state constitution requires indictment for such crime; yet Graham is now held for life in the penitentiary on information only, under the statute in question; and this is not due process of law.

The statute now in question conclusively presumes the fact and validity of the alleged prior convictions and concludes every defense against the defendant except only that of nonidentity of person; he is precluded from the right to present any defense to the alleged prior convictions,—the main fact presumed against him; he can not show a pardon; nor want of jurisdiction; nor acquittal of the prior charges of former conviction; nor any other defense whatever. In **Mobile J. & K. C. R. R. v. Turnipseed,** 219 U. S. 35, this court says (43) that whilst a State may create a legislative presumption, yet the statute—

> "must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed.

This rule is reiterated in **Lindsley Natural Carbonic Gas Company,** 220 U. S. 61, 81-82, wherein it is said that statutes are valid save where they have been found to be nearly arbitrary mandates or to discriminate invidiously between different persons in the same situation.

In West Virginia a preconvicted person out of the penitentiary is absolutely entitled to indictment and to make any defense he chooses to the charge of prior conviction; but such a person in the prison is entitled only to information and to make the single defense of non-identity of person to the charge of former conviction; and thus the statute now in question operates an arbitrary and inviduous discrimination between different persons in the same class, and is not due process of law.

As to what is and is not due process of law, see also **In re Kemmler,** 136 U. S. 436, 448; and **Holden v. Hardy,** 169 U. S. 366, 383

Third Specification of Error

Privileges and Immunities—
Double Jeopardy..

It is also contended that the defendant's privileges and immunities as a citizen of the United States are abridged by the State of West Virginia in making and enforcing the said statute, as he is thereby denied his immunity from double jeopardy in that—

A. That said statute requires, and there has been rendered and enforced thereunder, against him, two separate and distinct sentences one each by two separate and distinct courts at separate and distinct times in separate and distinct jurisdictions in separate and distinct proceedings upon what is in substance but one and the same verdict returned into but one court, although both the federal and State constitutions expressly declare the fundamental right and require that no person shall be twice put in jeopardy of life or liberty for the same offence.

B. The said statute requires that even if the prior convictions be alleged in the indictment,—

> "whether it be alleged or not in the indictment on which he was so convicted that he has been before

sentenced to a like punishment"—

yet if—

> "the record of his conviction does not show that he has been sentenced * * * to be confined in the penitentiary for life"—

in case of two prior conbictions, he shall thereafter, in another court, in another jurisdiction, in another and independent proceeding, by information not under oath, in which proceeding every defense except non-identity is concluded against him, be again subjected to the same jeopardy in which he was before placed when put on trial on an indictment alleging his former convictions in addition to the particular crime then involved.

C. He had previously and on a second conviction been sentenced to serve and had served five years in the said penitentiary, as aforesaid, solely by reason of a previous and first conviction in said State, yet the said present life sentence is necessarily based upon and inherently includes the said second conviction and said punishment therefor, and again subjects him to punishment therefor.

D. By the laws of the said State, prior convictions are made an essential part of an indictment for a subsequent crime and an inherent element of such subsequent crime itself, and when such prior convictions are not alleged in the indictment for such subsequent crime, and the accused is found guilty of the particular subsequent crime involved, and is sentenced to and confined in the penitentiary for such subsequent crime, and a subsequent and additional sentence for such prior convictions is imposed by another court in another county in another proceeding, the defendant is thereby put twice in jeopardy for such first and second convictions; because as to them he was necessarily put in jeopardy on his third trial and conviction; and the same result would have followed if such prior convictions had been alleged in the third indictment but had not been proved, and whether as to them the jury had found the defendant guilty or not guilty or had made no mention thereof in their verdict.

Ex parte Lange, 18 Wall. 163, covers our third specification of error quite completely, and, we believe, supports our contentions. The case is so very well known that to quote it would be a work of supererogation.

The second sentence (Record 6, 7) imposed on Graham, the defendant, is presumed to include punishment for his prior conviction. In **re Butler,** 138 Mich. 453; and see **Herndon v. Commonwealth,** 105 Ky. 197; **Oliver v. Commonwealth,** 113 Ky. 228; **Commonwealth vs. Phillips,** 11 Pick. 28; **Satterfield v. Commonwealth,** 105 Va. 867; and **Scott v. Chichester,** 107 Va. 933, in which the court quotes **Ex parte Longe,** 18 Wall. 163, thus:

> "If there is anything settled in the jurisprudence of England and America, it is that no man shall be twice punished by judicial judgments for the same offense."

The case of **Davis v. West Virginia, supra,** shows that the statute makes a former conviction an element of the guilt of the defendant on a second offense being committed. Unless this be so, where is the warrant for the infliction of the increased punishment? In **Peoples v. Sickles,** 156 N. Y. 541 (affirming 50 N. Y. Supp. 377), the court says:

> "The legislature has made the conviction of the commission of a former offense an ingredient of the guilt of the defendant, upon a second offense being committed. If it were not so there would be no warrant for the infliction of the increased punishment."

See also **Paetz-State,** 129 Wis. 174, 9 A. & E. Ann Cas. 767; **Davis v. State,** 134 Wis. 632; **People v. Craig,** 195 N. Y. 190 and **State v. Gordon,** 35 Mont. 458.

FOURTH SPECIFICATION OF ERROR.

Cruel and Unusual Punishment.

It is further contended that the said statute and sentence inflict cruel and unusual punishment on the defendant; this contention being based upon the following reasons:

In the **McDonald case** (180 U. S. 311), the maximum additional penalty was twenty-five years imprisonment in the state prison; while in the **Moore** (case 159 U. S. 673), the maximum additional penalty was imprisonment in the penitentiary for a term not exceeding the maximum term provided for the subsequent offense of which the defendant was convicted, except that if the subsequent conviction be for petit larceny, or for an attempt to commit an offense which, if perpetrated, would be punishable by imprisonment in the penitentiary, the person convicted of such subsequent offense should be punished by imprisonment in the penitentiary for a term not exceeding five years.

In the case at bar, the absolute requirement of the statute is life imprisonment on a third conviction. Although in the **Moore case** and in the **McDonald** case the additional penalty was held not to constitute cruel and unusual punishment, yet the statute now under consideration does inflict cruel and unusual punishment,—and this may be said without in any degree impigning on the correctness of the conclusion reached in those cases on this point. Indeed, in the very case of **McDonald** the court below (173 Mass. 322) conceded the possibility—

> "that punishment in the state prison for a long term of years might be so disproportionate to the offense as to constitute cruel and unsual punishment."

This subject is so elaborately considered (the above language being quoted) in **Weems v. United States,** 217 U. S. 347, 362-382, in which the point was considered as a plain error not assigned, under Rule 35 (page 362), that nothing more re-

mains to be said, except to state that the sentence of fifteen years of **Cadena,** together with certain accessories of the Penal Code, and a fine of 4000 pesetas, and costs, was held void as cruel and unusual punishment.

In **Stontenburg v. Frazer,** 16 App. D. C. 229, the court said (236):

> " • • • Under the constitution of the United States, Articles IV and VIII of the Amendments, every person is intended to be secure in his person against unreasonable searches and seizures and against cruel and unusual punishments, and it would clearly be a cruel and unnatural punishment to impose fine and imprisonment upon a party, because he might happen to be regarded by some persons as a **suspicious person,** without anything more."

If this be true, it must equally be cruel and unusual punishment to inflict life imprisonment in the penitentiary upon a person solely because he has twice before been convicted of penitentiary offenses.

In Howard v. North Carolina, 191 U. S. 126, this court says (136):

> " • • • But it is unnecessary to attempt to lay down any rule for determining exactly what is necessary to render a punishment cruel and unusual or under what circumstances this court will interfere with the decision of a state court in respect thereto. It is enough to refer to **In re Kemmler,** 136 U. S. 436, in which these questions were discussed, and to say that a sentence of ten years for an offence of the nature disclosed by the testimony, especially after it has been sustained by the Supreme Court of a State, does not seem to us deserving to be called cruel. • • • At any rate, there is no such inequality as will justify us in setting aside the judgment against the two."

The West Virginia Constitution forbids cruel and unusual punishment, and requires that "penalties shall be proportioned to the character and degree of the offence," the point that this statute and life sentence inflict cruel and unusual punishment may perhaps be considered as a denial of due process of law and the equal protection of the laws, since this provision of the statute arbitrarily and cruelly discriminates against third offenders, regardless of the character or degree of the three penitentiary offences of which they may have been convicted.

In the case of **In re Kemmler,** 136 U. S. 436, the court says (446):

> " * * * It is not contended, as it could not be, that the Eighth Amendment was in tended to apply to the States, but it is urged that the provision of the Fourteenth Amendment, which forbids a State to make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, is a prohibition on the State from the imposition of cruel and unusual punishments, and that such punishments are also prohibited by inclusion in the term 'due process of law'."

In **McElvaine v. Brush,** 142 U. S. 155, the court says (158):

> "It is contended that the solitary confinement thus provided for constitutes cruel and unusual punishment and brings the statute within the inhibition of the Eighth Amendment to the Federal Constitution.
>
> "The first ten articles of amendment were not intended to limit the powers of the States in respect of their own people, but to operate on the Federal government only; but the argument is, that so far as those amendments secure the fundamental rights of the individual, they make them his privileges and immunities as a citizen of the United States, which cannot now,

under the Fourteenth Amendment, be abridged by a State; that the prohibition of cruel and unusual punishments is one of these; and that that prohibition is also included in that 'due process of the law' without which no State can deprive any person of life, liberty, or property.

"We held in the case of **Kemmler,** 136 U. S.436, that this statute in providing for the punishment of death by electricity, was not repugnant to the Constitution of the United States when applied to a convict who committed the crime for which he was convicted after the act took effect; * * *."

As to what is and is not cruel and unusual punishment, see also **In re Kemmler,** 136 U. S. 436, 446.

Conclusion

It is therefore respectfully submitted that the judgment under review should be reversed, and the cause remanded with directions to vacate the judgment of the trial court and to discharge the plaintiff in error from imprisonment in the West Virginia penitentiary under the life sentence now in force.

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Moundsville, W. Va.,
December 20, 1911.

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FILE NO. 22797

Supreme Court of the United States.

OCTOBER TERM, 1911.

NO. 721

JAMES H. GRAHAM, *Plaintiff in Error,*

v.

THE STATE OF WEST VIRGINIA, *Defendant in Error.*

In Error to the Supreme Court of Appeals of the State of West Virginia.

BRIEF FOR DEFENDANT IN ERROR.

WILLIAM G. CONLEY,
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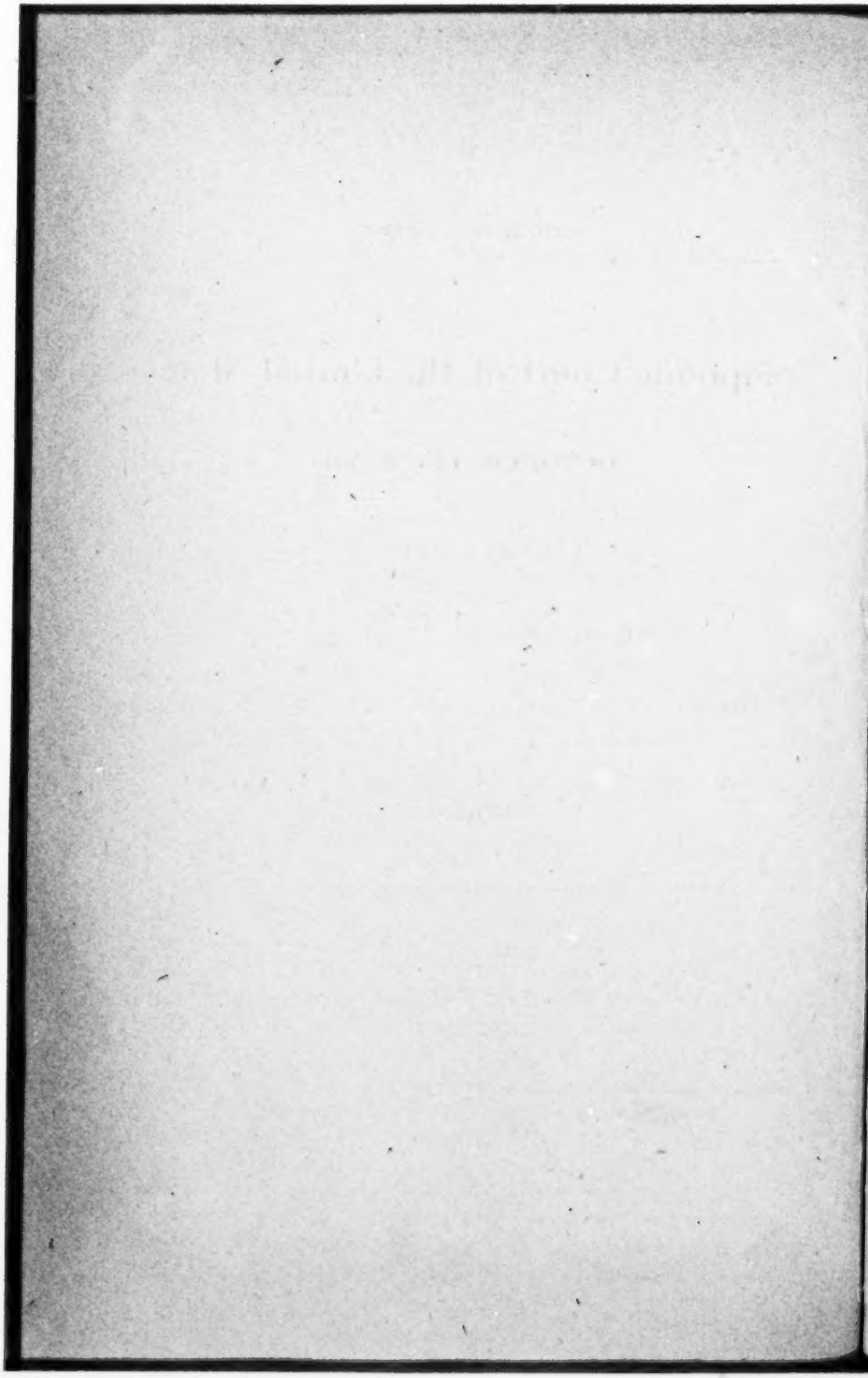
UNION PUBLISHING CO., CHARLESTON, W. VA



Supreme Court of the United States.

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v.
THE STATE OF WEST VIRGINIA, *Defendant in Error.*

In Error to the Supreme Court of Appeals of the State of West Virginia.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF FACTS.

James H. Graham, plaintiff in error, (hereinafter called defendant) was convicted of a felony in the Circuit Court of Pocahontas County, West Virginia, on April 6th, 1898, and sentenced to confinement in the penitentiary of West Virrginia for two years; thereafter, he was convicted of a felony in the Circuit Court of Mineral County, West Virginia, on April 23, 1901, and sentenced to confinement in the penitentiary for ten years; during the service of this sentence he was paroled by the Governor, under the provisions of the statute, found in Appendix A of this brief; he was again convicted of a felony in the Criminal Court of Wood County, West Virginia, and on September 11, 1907, sentenced to confinement in the penitentiary of West Virginia for five years. Each of these convictions was in a trial regurlarly held, upon indict-

ment of a grand jury, and neither the regularity nor legality thereof is questioned. These various counties in which the defendant was convicted of these felonies are widely separated and in entirely different parts of the State. The penitentiary of West Virginia is located at Moundsville, which is in Marshall County, of said State.

It is provided by sections 23 and 24 of chapter 152 of the Code of West Virginia:

> "23. When any person is convicted of an offense and sentenced to confinement therefor in the penitentiary, and it is alleged in the indictment on which he is convicted, and admitted, or by the jury found, that he had been before sentenced in the United States to a like punishment, he shall be sentenced to be confined five years in addition to the time to which he is or would be otherwise sentenced."
>
> "24. When any such convict shall have been twice before sentenced in the United States to confinement in a penitentiary he shall be sentenced to be confined in the penitentiary for life."

The foregoing sections were inherited from Virginia, and similar provisions are found in chapter 199 of the Virginia Code of 1860, as shown by Appendix B of this brief.

Upon the second conviction of the defendant Graham, which was had in the Circuit Court of Mineral County, West Virginia, his previous conviction in Pocahontas County, West Virginia, was alleged in the indictment and the extra sentence of five years prescribed in the foregoing section was imposed.

Upon his third conviction in Wood County, the indictment did not allege the previous convictions, and therefore the court did not impose the extra sentence prescribed by section 24 of chapter 152 above quoted.

It is provided by sections 1 to 5 of chapter 165 of the Code of West Virginia:

> "1. All criminal proceedings against convicts in the penitentiary shall be in the circuit court of the county of Marshall.
>
> "2. When a prisoner convicted of an offense, and sentenced to confinement therefor in the penitentiary, is received therein, if he was before sentenced to a like punishment, and the record of his conviction does not show that he has been sentenced under the twenty-

third or twenty-fourth section of chapter one hundred and fifty-two, the superintendent of the penitentiary shall give information thereof, without delay, to the said circuit court of the county of Marshall, whether it be alleged or not in the indictment on which he was so convicted, that he had been before sentenced to a like punishment.

"3. The said court shall cause the convict to be brought before it, and upon information filed, setting forth the several records of conviction, and alleging the identity of the prisoner with the person named in each, shall require the convict named to say whether he is the same person or not.

"4. If he say he is not, or remain silent, his plea, or the fact of his silence, shall be entered of record, and a jury shall be impaneled to inquire whether the convict is the same person mentioned in the several records.

"5. If the jury find that he is not the same person, he shall be remanded to the penitentiary; but if they find that he is the same person, or if he acknowledge in open court, after being duly cautioned, that he is the same person, the court shall sentence him to such further confinement as is prescribed by chapter one hundred and fifty-two, on a second or third conviction, as the case may be."

The foregoing statute is likewise inherited from Virginia, as in chapter 215 of the Virginia Code of 1860 (being the last Code preceding the separation of the States) provision was made for similar proceedings in the county in which the penitentiary of Virginia was located. A copy of the old Virginia Statute is inserted as Appendix C hereof.

On February 24, 1908, a trial was had in the Circuit Court of Marshall County, West Virginia, (being the county in which the penitentiary is situated) upon an information filed by the Prosecuting Attorney of that county, setting up specifically the various convictions of the defendant Graham, and praying due process of law against said defendant Graham (Record pp. 4-10). A demurrer and motion to quash was made by defendant and overruled by the court. Then defendant pleaded that he was not the same person named in the information, and trial by jury was had which resulted in a verdict finding the defendant to be the same person previously convicted as alleged in the information (Record, p. 11).

The defendant made a motion in arrest of judgment alleging,

First: That a proceeding by information violates section 4 of Art. III. of the Constitution of West Virginia which provides that "no person shall be held to answer for treason, felony or other crime, not cognizable by a justice unless on presentment or indictment of a grand jury," and that this proceeding therefore violated the 5th and 14th Amendments to the Constitution of the United States. Second: That the Criminal Court of Wood County, (in which the third conviction was had) had no jurisdiction to try the defendant. The motion was overruled, and the defendant was sentenced to life imprisonment in the penitentiary, as provided by the statute.

A writ of error was allowed by the Supreme Court of Appeals of West Virginia (being the court of last resort in said state), which court held, as disclosed by the syllabus, prepared by the court:

> 1. "The provisions of Code 1906, chapter 165, sections 1 to 5 inclusive, pursuant to which, by an information in the circuit court of the county in which the penitentiary is situated, there may be imposed the additional sentence provided by law upon a convict who once or twice before has been convicted and sentenced to a penitentiary, are not violative of any constitutional guaranty.
>
> 2. "By proceedings under the statute mentioned, the convict is not held to answer for a crime so as to require presentment or indictment of a grand jury, nor is he thereby twice put in jeopardy for an offense."
>
> *State* v. *Graham*, 68 W. Va. 248.

A writ of error was obtained from this Honorable Court, to this decision.

ARGUMENT.

The constitutionality of laws providing for the imposition of additional penalties upon habitual criminals is no longer an open question.

> *Moore* v. *Missouri*, 159 U. S. 673 (40 L. ed. 301);
> *MacDonald* v. *Massachusetts*, 180 U. S. 311 (45 L. ed. 542).

An attempt is made in this case to attack the statute prescribing the *method* of imposing this additional punishment, in the case of convicts in the penitentiary. It is assailed as contravening the Federal Constitution in four respects:

1. That it denies the equal protection of the laws.
2. That it is not due process of law.
3. That it constitutes double jeopardy.

4. That it imposes cruel and unusual punishment.

These contentions will be discussed in their order.

Equal Protection of the Laws.

It is true the Constitution of West Virginia provides:

> "* * * * * No person shall be held to answer for treason, felony or other crime, not cognizable by a justice, unless on a presentment or indictment of a grand jury * * * * *."
>
> Const. W. Va. Art. III., sec. 4.

It is likewise true that this proceeding is by information and not by indictment. These two statements do not necessarily mean that the statute contravenes the Federal Constitution. The Supreme Court of Appeals of West Virginia held that a proceeding under this statute was not a "holding to answer" within the meaning of the Constitution of West Virginia. *State v. Graham*, 68 W. Va. 248. The Supreme Court of Massachusetts in *Ross' Case*, 2 Pick. 165, 171, passing upon a similar statute of that state prior to the adoption of the Fourteenth Amendment to the Federal Constitution, also held the proceeding was not a "holding to answer" for an offense, but merely an indentification. An indictment was necessary at common law, yet the states may abolish that form of procedure if they wish.

> *Hurtado* v. *California*, 110 U. S. 516 (28 L. ed. 232);
> *Brown* v. *New Jersey*, 175 U. S. 173, 174 (44 L. ed. 119, 120)
> *West* v. *Louisiana*, 194 U. S. 258, 263 (48 L. ed. 965, 970).

As said by Mr. Justice Brewer:

> "For instance, while at the common law an indictment by the grand jury was an essential preliminary to trial for felony, it is within the power of the state to abolish the grand jury entirely, and proceed by information."
>
> *Brown* v. *New Jersey, supra.*

The common law was adopted in West Virginia, but may be changed by an act of the legislature. In the absence of a constitutional restriction, the legislature of West Virginia has the power to prescribe any other fair method of accusation of crime which it may deem expedient. It is restricted by the provision above quoted that "no person shall be held to answer for treason, felony, or other crime not cognizable by a justice, unless on presentment or indictment of a grand jury." (Const. W. Va. Art. III., sec. 4). This is the only constitutional restriction upon the general power

of the legislature to prescribe the method of accusation. If the defendant comes within that provision, then he is entitled to an indictment. If not, then he is only entitled to such an accusation as the legislature may provide, fairly and plainly informing him of the crime charged. The Supreme Court of West Virginia held in this case that the defendant Graham was not "held to answer" within the meaning of the constitutional provision. He can only claim the right of indictment by virtue of that constitutional provision, because in the absence of it, the legislature may provide any other fair method of accusation. The Supreme Court of Appeals of West Virginia says this proceeding does not come within that provision of the constitution. It is peculiarly the province of that court to construe this provision of the state constitution, and this Court will accept the construction of that court as the correct construction. A case directly in point is that of *West v. Louisana*, 198 U. S. 258 (48 L. ed. 965), in which this Court held the construction of the state court as to the meaning of the provision of the Constitution of Louisana, providing the accused should be confronted with the witnesses against him, would be accepted as binding. We submit the construction of this provision of the West Virginia Constitution by the Supreme Court of Appeals of West Virginia, is equally binding. That court holds the statute merely provides a means of identification. Other state courts, passing upon similar statutes, have held the same.

Ross' Case, supra.
King v. *Lynn*, 90 Va. 345.

This class of proceeding not being within the constitutional provision, is the defendant denied the equal protection of the laws because the legislature prescribed the identification should be made upon an information? We think not.

It is clear the Fourteenth Amendment does not insure the same rights and same laws to each individual. It permits a classification of persons. The classification must be reasonable, and all of a class must enjoy the same laws. It is thus simply stated by this Court in a recent opinion:

> "It is elementary that the contention is to be tested by considering whether there is a basis for the classification made by the statute."
> *Finley* v. *California*, decided Nov. 6, 1911.

The Constitution of West Virginia provides that "no person

shall be held to answer for treason, felony, or other crime, not cognizable by a justice, unless on presentment or indictment of a grand jury." There is no other constitutional provision requiring an indictment. The legislature by this act provides that convicts who have been previously convicted of two or more crimes, but not sentenced to the extra penalties provided by sections 23 and 24 of chapter 152 of the Code, may be proceeded against by information in Marshall County, West Virginia., and after a jury trial may be given the extra sentence. Does this statute make a reasonable classification? Is there some basis for it, founded upon reasonable grounds?

It is true this proceeding is only authorized in Marshall County. It is true it only applies to convicts. In so far as the various crimes are concerned, the defendant was convicted of them upon indictments of grand juries in the counties in which they were committed. He is in fact an habitual criminal. He merits the increased penalties imposed on habitual criminals fully as much as the habitual criminal convicted upon an indictment charging the other offenses.

West Virginia is a mountainous state. In a number of counties facilities for travel and communication are poor. By reason of the topography of the state, frequently a short distance can only be reached by a round-about course. The state has not the organized police departments in all of its counties that we find in large cities. In rural communities convictions are secured by evidence procured without much effort by the local sheriff and his deputies or the person injured by the criminal act. Obviously the most dangerous criminals, after one or two convictions, would assume another name and go to some new part of the state to renew their criminal operations. The local county authorities not having the modern identification facilities, would not know of the previous convictions and would not charge them in the indictment. On the other hand, the local thief, a native of the county, would be so well known to the officers that all his past transgressions would be charged against him, and he would be given the extra punishment, while the more dangerous criminal would escape with comparatively a light punishment. The same reasoning would apply to some hardened, habitual criminal, who, perhaps, had been sentenced to the penitentiary of California for one crime, then convicted and sentenced under another name, in Florida, and convicted and sentenced under still a different name in West Virginia. It is

a situation with which the local authorities are utterly unable to cope. It was to meet this condition that this statute was passed.

But, we are asked, why not indict by a grand jury? The trial under this statute is by jury. It is not a trial for crime, but merely a proceeding to identify the prisoner as the person previously convicted.

It has been said one of the reasons for an indictment is that the defendant may not be harassed by prosecutions founded on malice. Surely that objection would not apply to the proceeding at bar which is predicated upon an information by a sworn public officer. It is a proceeding largely similar to the return of an escaped convict.

It would be impracticable to take the prisoner out of the penitentiary and take him to one of the counties in which one of his crimes was committed; then indict him by a grand jury and try him by a petit jury. Therefore, Marshall County is the place fixed for such proceedings, because the penitentiary is situated in that county. A grand jury can only indict upon legal evidence before it. If the statute had required a proceeding by indictment it would have been necessary for the State to produce officers from each county where the defendant committed a crime to show his identity, and again produce them at the trial before the petit jury. Where one is "held to answer" for a crime, the trial is had in the county where the offense is committed. The witnesses are usually from that county, and it is inexpensive and easy to procure their attendance before the grand jury. This proceeding by information is peculiarly well adapted to proceedings against convicts, because the proceedings are always in Marshall County, and the crimes are mostly committed and witnesses reside in other counties—or, it may be, in other states. This classification is based upon a much clearer difference in public convenience and necessity, and actual difference in condition, than a classification which allows a conviction for the larceny of $19.99 without indictment and requires an indictment for the larceny of $20.01. The one being petit larceny (a misdemeanor) cognizable by a justice, and the other grand larceny (a felony) and not cognizable by a justice. The classification seems to be a reasonable one, based upon public convenience and necessity, where there is a distinct difference in the proceeding, it not being "a holding to answer," and where the defendant is in the custody of the law, serving a sentence for crime. This question

of the equal protection of the laws has been frequently before this Court, and we think a reference to some of these cases will conclusively show the correctness of our position.

In the early case of *Barbier* v. *Connolly*, 113 U. S. 27, 31 (28 L. ed. 923, 924), the scope of this provision of the Fourteenth Amendment is thus fully stated:

> "The 14th Amendment, in declaring that no State 'Shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty or arbitrary spoliation of property but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses. But neither the Amendment, broad and comprehensive as it is, nor any other amendment was designed to interfere with the power of the State, sometimes termed its 'police power,' to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits, for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon anyone, but to promote, with as little individual inconvenience as possible, the general good. Though, in many

> respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the Amendment."

The rule there laid down, has been closely adhered to through the many cases involving this question, despite the constant effort to give it a broader restrictive meaning.

And so this Court, in a later case, involving a statute making railroad companies liable for the injury to an employee, caused by the negligence of a fellow servant, said:

> "The objection that the law of 1874 deprives railroad companies of the equal protection of the laws is even less tenable than the one considered. It seems to rest upon the theory that legislation which is special in its character is necessarily within the constitutional inhibition, but nothing can be further from the fact. The greater part of all legislation is special either in the objects sought to be attained by it or in the extent of its application. Laws for the improvement of municipalities, the opening and widening of particular streets, the introduction of water and gas, and other arrangements for the safety and convenience of their inhabitants, and laws for the irrigation and drainage of particular lands, for the construction of levees and the bridging of navigable rivers, are instances of this kind. Such legislation does not infringe upon the clause of the 14th Amendment requiring equal protection of the law, because it is special in its character; if in conflict at all with that clause, it must be on other grounds. And when legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions."
> *Missouri &c. R. Co.* v. *Mackey*, 127 U. S. 205, 209 (32 L. ed. 107).

And again, in *Duncan* v. *Missouri*, 152 U. S. 377, 382 (38 L. ed. 485) it is said:

> "due process of law and the equal protection of the laws are secured if the laws operate on all alike, and do not

subject the individual to an arbitrary exercise of the powers of government."

Classification may result in some inequality between the classes, but this does not render the act unconstitutional. So, an act making railroad companies liable for fires caused by the operation of their railroads, and providing for an attorney's fee to be included in the judgment, is not within the inhibition of the amendment. *Atchison &c. R. Co.* v. *Matthews*, 174 U. S. 96 (43 L. ed. 909). In this opinion the Court said:

> "It is the essence of a classification that upon the class are cast duties and burdens different from those resting upon the general public. Thus, when the legislature imposes on railroad corporations a double liability for stock killed by passing trains it says, in effect, that if suit be brought against a railroad company for stock killed by one of its trains it must enter into the courts under conditions different from those resting on ordinary suitors. If it is beaten in the suit it must pay, not only the damage which it has done, but twice that amount. If it succeeds it recovers nothing. On the other hand, if it should sue an individual for destruction of its livestock it could under no circumstances recover any more than the value of that stock. So that it may be said that in matter of liability, in case of litigation, it is not placed on an equality with other corporations and individuals; yet this court has unanimously said that this differentiation of liability, this inequality of right in the courts, is of no significance upon the question of constitutionality. Indeed, the very idea of classification is that of inequality so that it goes without saying that the fact of inequality in no manner determines the matter of constitutionality."

An anti-trust statute requiring indictment of persons violating its provisions, but providing suit in equity against a corporation which violates the same provision, does not deny the corporation the equal protection of the laws, within the meaning of the Fourteenth Amendment.

Standary Oil Co. v. *Tennessee*, 217 U. S. 413 (54 L. ed. 817).

Mr. Justice Holmes, in part, said:

> "Hence, it is said, this statute denies to corporations the equal protection of the laws. For although it is addressed generally to the prevention of a certain kind of conduct, whether on the part of corporations or unincorporated men, the latter cannot be tried without a

preliminary investigation by a grand jury, an indictment or presentment, a trial by jury, the right to an acquittal unless their guilt is established beyond a reasonable doubt, and the benefit of a statute of limitations of one year. Corporations, on the other hand, are proceeded against by bill in equity on relation of the attorney general, without any of these advantages, except, perhaps, the right to a jury. Complaint is not made of the difference between fine or imprisonment and ouster, but it is insisted that this is a general criminal statute, that ouster is a punishment as much as a fine, and that it is not a condition attached to the doing of business by foreign corporations (*Carroll* v. *Greenwich Ins. Co.* 199 U. S. 401, 409 (50 L. ed. 246, 249), 26 Sup. Ct. Rep. 66), or, indeed, a regulation of the conduct of corporations, as such, at all. Therefore the plaintiff in error complains that it is given a wrongful immunity from the procedure of the criminal law. This suit is for the same transaction for which, in the earlier case cited above, an agent of the company was indicted and fined.

"The foregoing argument is one of the many attempts to construe the 14th Amendment as introducing a factitious equality without regard to practical differences that are best met by corresponding differences of treatment. The law of Tennessee sees fit to seek to prevent a certain kind of conduct. To prevent it the threat of fine and imprisonment is likely to be efficient for men while the latter is imposible and the former less serious to corporations. On the other hand, the threat of extinction or ouster is not monstrous, and yet is likely to achieve the result with corporations, while it would be extravagant as applied to men. Hence, this difference is admitted to be justifiable. But the admission goes far to destroy the argument that is made. For if a fundamental distinction may be made in the evils that different delinquents are forced to suffer, surely the less important and ancient distinction between the modes of establishing the delinquency, according to the nature of the evil inflicted, even more easily may be justified. The supreme court of the state says that the present proceeding is of a civil nature; but assuming that nevertheless it ends in punishment, there is nothing novel or unusual about it. We are of opinion that subjection to it; with its concomitant advantages and disadvantages, is not an inequality of which the plaintiff in error can complain, although natural persons are given the benefit of the rules to which we have referred before incurring the possible sentence to prison, which the plaintiff in error escapes."

And likewise a statute prohibiting advertising in "trucks, vans, or wagons" which applies to stages, but not to street cars or other public conveyances, does not contravene this constitutional provision.

Fifth Ave. Coach Co. v. *New York*, 221 U. S. 467 (55 L. ed. 815).

Nor is an act unconstitutional which requires deposits of savings banks unclaimed for thirty years to be paid into the State treasury for safekeeping, and which does not apply to similar deposits in other banks.

Provident Institution for Savings v. *Malone*, 221 U. S. 660 (55 L. ed. 899).

The Fourteenth Amendment does not secure to all the *same* laws. This has been clearly expressed in *Missouri* v. *Lewis*, 101 U. S. 22 (25 L. ed. 989). In part the Court said:

> "The 14th Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each State prescribes its own modes of judicial proceeding. If diversities of laws and judicial proceedings may exist in the several States without violating the equality clause in the 14th Amendment, there is no solid reason why there may not be such diversities in different parts of the same State. A uniformity which is not essential as regards different states can not be essential as regards different parts of a State, provided that in each and all there is no infraction of the constitutional provision. Diversities which are allowable in different States are allowable in different parts of the same State. Where part of a State is thickly settled, and another part has but few inhabitants, it may be desirable to have different systems of judicature for the two portions; trial by jury in one, for example, and not in the other. Large cities may require a multiplication of courts, and a peculiar arrangement of jurisdictions. It would be an unfortunate restriction of the powers of the State government if it could not, in its discretion, provide for these various exigencies."

In holding constitutional an act of the legislature of Missouri, giving more peremptory challenges to the accused in certain parts of the state than in other parts of the same state, this Court said:

> "The Fourteenth Amendment to the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. *It merely requires that all persons subjected to such legislation shall be treated alike,* under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed."
>
> *Hayes* v. *Missouri*, 120 U. S. 68 (30 L. ed. 578).

The most recent application of the many authorities in a criminal case is found in *Findley* v. *California*, decided November 6, 1911. In that case the classification was much more limited than in the case at bar. The defendant was there sentenced to death under a statute which provided:

> "Every person undergoing a life sentence in a state prison of this state, who, with malice aforethought, commits an assault upon the person of another with a deadly weapon or instrument, or by any means or force likely to produce great bodily injury is punishable with death."

The foregoing statute does not apply to all convicts, as does the West Virginia statute now before the Court, but only to those serving a life sentence. The penalty imposed under the California statute is the highest known to the law and much higher than imposed on freeman for the same offense, or even upon convicts who are not serving life sentences. This Court held there was a basis for the classification, and the statute was constitutional.

Counsel for the defendant rely chiefly upon the cases of *Connolly* v. *Union Sewer Pipe Company*, 184 U. S. 840, and *Cotting* v. *Kansas City Stock Yards Company*, 183 U. S. 79, and quote copiously from these opinions in their brief. We do not feel it is necessary for us to discuss these cases at length. They do not vary the rule early announced and steadfastly adhered to in all of the decisions, that there may be a classification if there is a basis—a difference therefor. In the two cases last mentioned, the Court held there was an arbitrary discrimination, with no reasonable basis supporting the classification. The other cases from this Court cited in the brief for defendant are in accord with those we have cited herein. While the opinions of the state courts cited in the brief of counsel for defendant are persuasive, yet if they attempt to announce any other rule, they are of no value.

In at least two other states—Massachusetts and Virginia—similar statutes have long been in effect. These statutes have been approved by the courts of last resort of each of these states. This of itself tends strongly to show that the statute of the legislature of West Virginia is not an arbitrary classification. It is recognized not only in West Virginia, but in these other states, that a proceeding by information, against a convict in the penitentiary, in the county in which the penitentiary is situated, for the purpose of imposing the extra punishment is a fair way to proceed, and that there is such a difference in the objects sought to be accomplished as to make it different from a "holding to answer" for a crime and to justify the classification.

In *State of West Virginia* v. *Davis*, 68 W. Va. 142, the court held that the lower court erred in imposing a more severe penalty for a second offense, when the indictment did not charge any previous offense, nor did the evidence on the trial show it. There was neither charge nor evidence to support the higher punishment. The trial court proceeded on the theory that it could take judicial notice of the previous offense. The accused had no notice and no opportunity to show he had not been convicted of a previous offense. Counsel for defendant in the case at bar, attempt to construe this opinion as holding the charge must be made by indictment. Obviously the court did not so hold. The right to proceed by information rests upon the statute before us, and in the *Davis Case*, the court was passing upon an entirely different statute, which did not prescribe how the charge should be made. Undoubtedly the proceeding there would be by indictment. However, the court in the *Davis Case* did not go that far, but simply held the judgment must be supported by charge and evidence. In this proceeding Graham knew with what he was charged, and the evidence established the truth of the charge.

The imposition of more severe penalties upon habitual convicts is recognized as not only constitutional, but as a wise governmental policy. It would be highly unfair and unjust to have a system of imposing these additional penalties which would in practice apply to the local transgressor, but be ineffective so far as the dangerous, habitual criminal is concerned. That all who deserve this additional punishment may, as far as possible, receive it, this statute was passed. It is based upon an actual difference in the condition and location of convicts, and upon the fact that any other method would be ineffective and valueless. So far as any

actual prejudice is concerned, we must confess we fail to see how it can injure the defendant's rights so long as he is fairly informed of the accusation—whether by indictment of a grand jury, or information of a sworn public officer; especially when he has had the benefit of an indictemnt for each of his crimes. But, be that as it may, the classification is not an arbitrary one, but based upon an actual difference in condition and situation—a difference met in the same way by at least three states of the union. Again recurring to *Standard Oil Company* v. *Tennessee*, *supra*, counsel are attempting to introduce "a factitous equality without regard to practical differences that are best met by corresponding differences of treatment." In the case at bar the legislature of West Virginia has sought to meet the practical differences we have shown exist, by a difference in treatment applicable to the condition of the persons affected. We submit the statute does not deny the defendant and those in the same class with him, the equal protection of the laws.

Due Process of Law.

Counsel for defendant, in their brief (page 12) say this case differs from *Hurtado* v. *California*, 110 U. S. 516, because, they say the Constitution of West Virginia affirmatively demands an indictment. The Constitution only demands it in certain classes of proceedings. This class is not one. *State* v. *Graham*, 68 W. Va. 248. The opinion of the Supreme Court of Appeals of West Virginia upon this point will be treated as binding by this Court, as we have heretofore shown.

There is no constitutional provision requiring an indictment or presentment of a grand jury in this character of proceeding. The legislature is therefore free to provide other fair means of plainly informing the accused of the charge against him. It has provided an information. This is due process of law.

Hurtado v. *California*, 110 U. S. 516 (28 L. ed. 232).

Counsel in discussing this feature in their brief (page 30) attempt to show the Supreme Court of Appeals of West Virginia held this extra punishment was inflicted without a charge of crime. In support of their contention they quote a part of the opinion as found on pages 16 and 17 of the record. A further quotation shows the view of the court:

> "Nor was Graham again put in jeopardy for the offense as to which he stood convicted in Wood county.

The constitution does forbid that one be twice put in jeopardy of life or liberty for the same offense. But it does not forbid that the Legislature may provide proceedings for the identification of those convicted of crime upon whom as a class the law imposes additional punishment. By a single jeopardy the former convict has been held to answer and the offense established against him. Thus he has been classed with those over whom, by law, hangs additional imprisonment. It only remains for him to be properly identified as belonging to that class. The identification may be at the time of the trial for the offense, if the facts are then known and alleged; or it may be later, at the penitentiary, when the facts develop. This later identification is not a second jeopardy for the offense. It is only an incident to the jeopardy that already exists. Nor is the additional sentence a second punishment for the offense. But one punishment is made to attach to the crime.

"Our law does not make it an offense or crime for one to have been convicted more than once. Former conviction is not an integral part of the second or new offense. The law simply enjoins longer sentence because of former conviction. It does not prosecute and punish for the former conviction. It cannot do that. It adds punishment for the crime as to which one is lastly convicted because of the class to which he belongs. *Moore* v. *State of Missouri*, 159 U. S. 673, and the cases cited therein. The sentence is an incident to the last offense alone. But for that offense it would not be imposed. So proceedings made under this statute cannot be said to constitute a holding to answer for crime or a placing in second jeopardy for an offense. They are merely ancillary proceedings for the rightful sentence which the law mandatorily enjoins upon those already held or jeopardized."

The defendant is punished for a crime. This proceeding merely gives him the punishment the mandatory language of the statute would have compelled the trial judge to impose if the facts had been known, charged and proven at the time of his trial for the last offense.

But counsel claim he cannot raise the question of the correctness of his former convictions. Of course not. He has been tried for them by a jury of his peers, found guilty, and sentenced. Are the verdicts of juries and judgments of courts of no binding value? Upon this proceeding it is determined whether or not he has been previously adjudged a criminal a sufficient number of times to

make him an habitual criminal within the meaning of the statute, and any evidence tending to show he has not been so convicted is admissible under the statute.

This matter is so completely and thoroughly disposed of in *Hurtado* v. *California*, 110 U. S. 516 (28 L. ed. 282), that we will not consume the time of the Court in a further discussion of this point. The defendant has not been denied due process of law.

Double Jeopardy.

In passing upon a similar statute the Massachusetts court said:

> "But in our view the punishment is for the last offense committed, and it is rendered more severe in consequence of the situation into which the party had previously brought himself. In regard to the objection made to the process, this is not an information of an offense for which a trial is to be had, but of a fact, namely, that the prisoner has already been convicted of an offense; that this fact must appear either by his own confession, or by verdict of a jury or otherwise according to law, before he can be sentenced to the additional punishment. Is he to be sentenced for an offense distinct from the one for which he has been tried upon an indictment? We apprehend not; but the only question is, whether he is such a person as ought to have been sentenced, on his last conviction to additional punishment, if the fact of a former conviction had been known to the Court. There was no need of a presentment by a grand jury, for no offense was to be inquired into. That had already been done. An indictment is confined to the question whether an offense has been committed. Here the question was simply whether the party had been convicted of an offense."
>
> *Ross' Case*, 2 Pick. 165, 171.

Cited and quoted from with approval in *Moore* v. *Missouri*, 159 U. S. 673 (40 L. ed. 301). In the last case, after reviewing the authorities, this Court said:

> "It is quite impossible for us to conclude that the Supreme Court of Missouri erred in holding that the plaintiff in error was twice put in jeopardy for the same offense."
>
> *Moore* v. *Missouri, supra.*

And in the later case of *MacDonald* v. *Massachusetts*, 180 U. S. 311 (45 L. ed. 543), it is said:

> "The allegation of previous convictions is not a distinct charge of crimes, but is necessary to bring the case within the statute and goes to the punishment only."

The same is true of the various crimes and convictions set up in the information in the case at bar. They are merely recited as fixing the status of the defendant and affect the punishment only. He is not tried for the crimes.

We submit counsel are in error when they say (Brief, page 36) "The case of *Davis* v. *West Virginia, supra*, shows that the statute makes a former conviction an element of the guilt of the defendant on a second offense being committed." What the court did hold in the *Davis Case* was that a judgment which was neither founded on a charge or evidence, was invalid. The court directly passed on this question in the case at bar, and held "*Former conviction is not an integral part of the second or new offense*" (Record, p.16). This is in accord with the ruling of this Court in the *Moore* and *MacDonald Cases, supra*. There cannot be jeopardy in this proceeding, because the defendant is not held to answer for any crime, and we submit this assignment of error is not well taken.

Cruel and Unusual Punishment.

It is claimed this sentence for life is a cruel and unusual punishment. We assume counsel do not claim it is cruel and unusual merely because it is a life sentence. Life sentences are too frequently imposed to make such a claim. We suppose it is claimed the sentence in this case is so disproportionate to the offense as to be cruel and unusual. We submit this Court will not consider this assignment of error, because it was not raised in the state courts. The assignments of error in the Supreme Court of Appeals of West Virginia, were omitted from the record in this case, by agreement, at the request of the defendant Graham. An examination thereof shows this question was not raised in the state court. The assignments of error in the Supreme Court of Appeals of West Virginia are printed as Appendix "D" to this brief. We submit this Court will not pass upon this question. We will, however discuss it, less the Court should differ from our view.

"Cruel and unusual punishment" means just what the words imply, and so the courts apply the rule. As has been said:

> "So that, if the punishment prescribed for an offense against the laws of a state were manifestly cruel

> and unusual, as burning at stake, crucifixion, breaking on the wheel or the like, it would be the duty of the court to adjudge such penalties to be within the constitutional prohibition."
>
> *Ex parte Kemmler*, 136 U. S. 436 (34 L. ed. 519).

To this might be added any punishment so unusually severe as to shock the conscience of the court. An additional punishment imposed upon habitual criminals is not cruel and unusual punishment within the constitutional inhibition.

Moore v. *Missouri, supra;*
MacDonald v. *Massachusetts, supra.*

In the *MacDonald case* the statute imposed a penalty of twenty-five years for a third offense. It is a matter of common knowledge that this is much more than the average "prison life." It is practically a life sentence, for the convict can hardly hope to outlive the term—especially when he has previously served two terms in the penitentiary.

This Court, in *Findley* v. *California, supra*, approved a statute imposing death sentence upon "life termers" who committed a malicious assault, although such an assault would be punished by a merely nominal imprisonment if committed by some one other than a person serving a life sentence. There must be some effective punishment. If sentences of two and ten years, respectively, in the penitentiary did not deter the defendant in this case, it is obvious he is such a hardened, habitual criminal, who is only safe within prison walls. Sentences that would scare into honest ways the ordinary man, do not answer the purpose so far as the defendant is concerned, and we think he is not safe at large.

The case of *Weems* v. *United States*, 217 U. S. 347, is chiefly relied on by counsel for defendant. In that case the punishment was inherited from the old Spanish regime and was, from the American viewpoint, unusual and disproportionate to the offense. Neither was that the case of an habitual criminal. There is nothing in any of the cases cited in the brief for defendant that would even imply the punishment in this case is so disproportionate to the offense as to constitute cruel and unusual punishment. The record shows such an habitual criminal as cannot safely be at large; terms in prison seem to work no reformation; and we submit the punishment is merely commensurate with the crime and the criminal.

CONCLUSION.

We contend that the defendant has received the complete protection of the law; that no unjust advantage has been taken of him; that his punishment is just; and that the particular statute under which he was tried and sentenced is constitutional. Wherefore, we respectfully submit, this writ of error ought to be dismissed and the judgment of the Supreme Court of Appeals of West Virginia affirmed.

WILLIAM G. CONLEY,
Attorney General of West Virginia.

Charleston, W. Va.
March 23, 1912.

APPENDIX "A".

Sec. 4682. The Governor shall have authority, under such rules and regulations as he may prescribe, to issue a parole or permit to go at large, to any convict who now is, or hereafter may be, imprisoned in the Penitentiary of this State, under sentence other than a life sentence, who may have served the minimum term provided by law for the crime for which he was convicted, and who has not previously served two terms of imprisonment in any penal institution for felony.

Every convict, while on parole, shall remain in the legal custody and under the control of the Governor, and shall be subject at any time to be taken back within the enclosure of the penitentiary for any reason that shall be satisfactory to the Governor, and at his sole discretion; and full power to re-take and return any such paroled convict to the penitentiary is hereby expressly conferred upon the Governor, whose written order, when attested by the Secretary of State, shall be a sufficient warrant, authorizing all officers named therein to return to actual custody in the penitentiary any such paroled convict, and it is hereby made the duty of all officers to execute said order the same as an ordinary criminal process.

This act shall not be construed to operate in any sense as a release of any convict paroled under its provisions, but simply as a permit granted to such convict to go without the enclosure of the penitentiary, and while so at large he shall be deemed to be serving out the sentence imposed upon him by the court, and shall be entitled to good time the same as if he were confined in the penitentiary.

Code W. Va., ch. 163, sec. 45.

APPENDIX "B".

25. When any person is convicted of an offence, and sentenced to confinement therefor in the penitentiary, and it is alleged in the indictment on which he is convicted, and admitted, or by the jury found, that he had been before sentenced in the United States to a like punishment, he shall be sentenced to be confined five years in addtion to the time to which he is or would be otherwise sentenced.

26. When any such convict shall have been twice before, sentenced in the United States to confinement in a penitentiary, he shall be sentenced to be confined in the penitentiary for life.

Virginia Code 1860, ch. 199, secs. 25, 26.

APPENDIX "C".

1. All criminal proceedings against convicts in the penitentiary, shall be in *the circuit court for the city of Richmond.*

2. When a person convicted of an offense, and sentenced to confinement in the penitentiary, is received therein, if he was before sentenced to a like punishment, and the record of his conviction does not show that he has been sentenced under the twenty-fifth or twenty-sixth section of chapter one hundred and ninety-nine, the superintendent of the penitentiary shall give information thereof, without delay, to the said *circuit court of the city of Richmond,* whether it is alleged or not in the indictment on which he was so convicted, that he had been before sentenced to a like punishment.

3. The said court shall cause the convict to be brought before it, and upon an information filed, setting forth the several records of conviction, and alleging the identity of the prisoner with the person named in each, shall require the convict to say whether he is the same person or not.

4. If he say he is not, or remain silent, his plea, or the fact of his silence, shall be entered of record, and a jury of by-standers shall be impaneled, to enquire whether the convict is the same person mentioned in the several records.

5. If the jury find that he is not the same person, he shall be remanded to the penitentiary; but if they find that he is the same person, or if he acknowledge in open court, after being duly cautioned, that he is the same person, the court shall sentence him to such further confinement as is prescribed by chapter one hundred and ninety-nine, on a second or third conviction, as the case may be.

Virginia Code, 1860, chapter 215, sections 1-5.

APPENDIX "D".

First Assignment:

"The court erred in refusing to quash the information for the following reasons: (1) That the information was improperly made and filed, (2) that the information should have been sworn to."

Second Assignment:

"That the Circuit Court of Marshall County erred in holding that the Criminal Court of Wood County, had jurisdiction to try your petitioner for the alleged third conviction, as the jurisdiction was in the Circuit Court of Marshall County."

Third Assignment:

"That the court erred in holding that your petitioner was not 'a convict in the Penitentiary' within the meaning of chapter 45, Acts of 1903, known as the Penitentiary Act."

Fourth Assignment:

"The court erred in holding that these alleged convictions could be properly made the basis of a prosecution by information."

Fifth Assignment:

"The court erred in holding that this proceeding was not 'A Holding to answer' within the meaning of section 4, article III. of the Bill of Rights of the Constitution of West Virginia, which provides that, 'no person shall be held to answer for treason, felony, or other crime, not cognizable by a justice, unless on presentment or indictment of a grand jury.' "

Sixth Assignment:

"The court erred in holding that the statute under which this proceeding was had, is not in conflict with so much of the fifth (5) Article of amendment to the Constitution of the United States as provides that. 'No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury.' "

Seventh Assignment:

"The Court erred in holding that the statute under which this proceeding was had is not in conflict with and prohibited by so much of the fourteenth (14th) article of amendment to the Constitution of the United States as provides as follows: 'Nor shall any State deprive any person of life, liberty, or property without due process of law.' "

Eighth Assignment:

"The Court erred in admitting exhibit No. 1, to S. G. Legg's testimony over the objection of the defendant for the reason there is a variance between the conviction set forth in the exhibit and that alleged in the information, to-wit, the information alleges the

conviction as of September 11th, 1907, whereas the exhibit shows it to have been September 13th, 1907."

Ninth Assignment:

"The Court erred in applying the statute to your petitioner under any view of the case, in as much as the section under which the prayer for process is based against your petitioner, to-wit, section 24, has been changed by the Compiler from the 26th section of Chapter 152 to the 24th section of chapter 152, to make the reference correspond to the section intended, as thought by the Compiler, which would be an Act different, than that enacted by the Legislature, as shown by the original Act and the Journal of the House for the year 1868, page 96."

Tenth Assignment:

"The court erred in refusing to set aside the verdict of the jury and grant your petitioner a new trial because the verdict was contrary to the law and evidence."

Eleventh Assignment:

"The court erred in refusing your petitioner's motion in arrest of judgment and not discharging him."

GRAHAM *v.* STATE OF WEST VIRGINIA.

ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

No. 721. Argued April 17, 1912.—Decided May 13, 1912.

The statute of West Virginia, providing that where a prisoner has been convicted and sentenced to the penitentiary, the question of his identity with one previously convicted one or more times can be tried on information, and if proved, imposing additional imprisonment in case of one prior conviction for five years, and in case of two convictions, for life, is not unconstitutional, as to one twice previously convicted and on whom life imprisonment has been imposed, either as depriving him of his liberty without due process of law, denying him the equal protection of the law, placing him in second jeopardy for the same offense, abridging his privileges and immunities as a citizen of the United States, or inflicting cruel and unusual punishment.

The propriety of inflicting severer punishment upon old offenders has long been recognized in this country and in England—such increased punishment is not a second punishment for the earlier crime but is justified by the repetition of criminal conduct.

One who has been convicted before is not denied due process of law by having the question of identity passed upon separately from the question of guilt of the second offense.

A State which adopts the policy of heavier punishment for repeated offending may provide for guarding against second offenders escaping by reason of their identity not being known at the time of sentence.

Proceeding by information instead of indictment to ascertain the identity of a convicted criminal with one previously convicted does not deny due process of law or equal protection of the law; and this even if other persons accused of crime are proceeded against by indictment.

The Fourteenth Amendment did not introduce a factitious equality without regard to practical differences that are best met by corresponding differences of treatment, *Standard Oil Co.* v. *Tennessee*, 217 U. S. 413; and a State may make different arrangements for trials under different circumstances of even the same class of offenses, if all in the same class are subject to the same procedure.

Where one has been charged with having been previously convicted of another offense, he is not put in double jeopardy by having the question of his identity determined by a trial, nor are any of his immunities and privileges as a citizen of the United States abridged.

The imposition of a heavier penalty for repeated offenses does not amount to inflicting a cruel and unusual punishment.

Questions of validity of a state penal statute under the state constitution are not open in this court.

68 W. Va. 248, affirmed.

THE facts, which involve the constitutionality of a statute of West Virginia providing for heavier penalties on persons convicted of crime if previously convicted, and for determining the identity of persons formerly convicted, are stated in the opinion.

Mr. D. W. Baker, with whom *Mr. Frank J. Hogan*, *Mr. Everett F. Moore* and *Mr. D. B. Evans* were on the brief, for plaintiff in error:

Defendant is a person within the jurisdiction of the State of West Virginia, and is denied by the said State the equal protection of the laws, because the statute arbitrarily discriminates among persons in the same class and condition. Art. III, § 4, Code, c. 152, § 1. It permits persons of his class to be proceeded against by information while all others have the right to be proceeded against only by indictment; so that the said statute denies even one and the same person the equal protection of the laws, in that if he be out of the penitentiary he is entitled as of right to the protection of the grand jury and its indictment returned and pending against him, but if he be in the prison this right is *ipso facto* taken arbitrarily from him and is replaced by the right to an information only,

presenting and permitting the single issue of identity of person.

The statute requires the said prosecution against him to be by information, and the sentence to be to the penitentiary for life, whereas the constitution and laws of said State (except only this statute) require all acts or omissions punishable by imprisonment in the penitentiary to be prosecuted and punished "on a presentment or indictment of a grand jury," and not otherwise. *Hodgson* v. *Vermont*, 168 U. S. 272; *Bowman* v. *Lewis*, 101 U. S. 22, 33; *In re Lowrie*, 8 Colorado, 499; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540.

Applying the principles of the last-cited case, the West Virginia statute now in question denies the defendant the equal protection of the laws in the respects and for the reasons which we have already mentioned; and in that each section of the statute is so connected and interwoven with the other sections, the invalidity of any one section destroys the entire act. *Caldwell* v. *Texas*, 137 U. S. 692, 697; *State* v. *Lewin*, 53 Kansas, 697; *Budd* v. *State*, 22 Tennessee, 483; *Rogers* v. *Alabama*, 192 U. S. 226; *Bell's Gap Railroad* v. *Pennsylvania*, 134 U. S. 232, 237; *Gulf, Colorado & Sante Fe Railway* v. *Ellis*, 165 U. S. 150, 165; *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, 293; *Cotting* v. *Kansas City Stock Yards Company*, 183 U. S. 79, 100, 112.

So, in the case at bar, the statute is a positive and direct discrimination between persons in exactly the same class—those who have suffered former convictions—based simply upon the fact that the prisoner is in the penitentiary. *In re Landford*, 57 Fed. Rep. 570.

That the statute violates the equality clause of the Federal Constitution, see *West Virginia* v. *Davis*, 69 S. E. Rep. 639, decided by the same court one week prior to this case.

Thus the laws of West Virginia discriminate, so as to

put plaintiff in error into the penitentiary for life on an unsworn information, simply because he was in the prison, and in favor of Davis, so as to keep him out of the county jail, unless on indictment alleging, and proof showing, a former conviction.

Defendant is deprived of his liberty and property by the State of West Virginia without due process of the law in that the statute which requires the imprisonment of the defendant in the penitentiary for life under the sentence imposed on him under an unsworn information operates a deprivation of his liberty without due process of law. This aspect of the case is not controlled by *Hurtado* v. *California*, 110 U. S. 516, but see *Stoutenburg* v. *Frazier*, 16 App. D. C. 229, 235, 236; *Curry* v. *Dist. of Col.*, 14 App. D. C. 423, 439; *Lappin* v. *Dist. of Col.*, 22 App. D. C. 68, 77.

The statute conclusively presumes the fact and validity of the alleged prior convictions and concludes every defense against the defendant except only that of non-identity of person; he is precluded from the right to present any defense to the alleged prior convictions—the main fact presumed against him; he cannot show a pardon; nor want of jurisdiction; nor acquittal of the prior charges of former conviction; nor any other defense whatever. *Mobile, J. & K. C. R. R.* v. *Turnipseed*, 219 U. S. 35, 43; *Lindsley* v. *Carbonic Gas Co.*, 220 U. S. 61, 81.

As to what is and is not due process of law, see *In re Kemmler*, 136 U. S. 436, 448; *Holden* v. *Hardy*, 169 U. S. 366, 383.

Defendant's privileges and immunities as a citizen of the United States are abridged in making and enforcing the said statute, as he is thereby denied his immunity from double jeopardy. *Ex parte Lange*, 18 Wall. 163; *In re Butler*, 138 Michigan, 453; *Herndon* v. *Commonwealth*, 105 Kentucky, 197; *Oliver* v. *Commonwealth*, 113 Kentucky, 228; *Commonwealth* v. *Phillips*, 11 Pick. 28; *Satter-*

field v. *Commonwealth*, 105 Virginia, 867; *Scott* v. *Chichester*, 107 Virginia, 933.

The case of *Davis* v. *West Virginia*, *supra*, shows that the statute makes a former conviction an element of the guilt of the defendant on a second offense being committed. Unless this be so, where is the warrant for the infliction of the increased punishment? *Peoples* v. *Sickles*, 156 N. Y. 541. See also *Paetz* v. *State*, 129 Wisconsin, 174, 9 A. & E. Ann. Cas. 767; *Davis* v. *State*, 134 Wisconsin, 632; *People* v. *Craig*, 195 N. Y. 190, and *State* v. *Gordon*, 35 Montana, 458.

The statute and sentence inflict cruel and unusual punishment on the defendant. See *The McDonald Case*, 180 U. S. 311; *The Moore Case*, 159 U. S. 673; *Weems* v. *United States*, 217 U. S. 347, 362; *Stoutenburg* v. *Frazier*, 16 App. D. C. 229; *Howard* v. *North Carolina*, 191 U. S. 126, 136; *In re Kemmler*, 136 U. S. 436; *McElvaine* v. *Brush*, 142 U. S. 155.

Mr. William G. Conley, Attorney General of the State of West Virginia, for defendant in error.

Mr. Justice Hughes delivered the opinion of the court.

In April, 1898, the plaintiff in error, James H. Graham, then known as John H. Ratliff, was indicted for grand larceny in Pocahontas County, West Virginia, pleaded guilty, and was sentenced to the penitentiary for two years. In April, 1901, under the name of Ratliff, he was indicted for burglary in Pocahontas County, West Virginia, pleaded guilty and was sentenced to the penitentiary for ten years. In October, 1906, he was granted a parole by the Governor of West Virginia upon condition that he should pursue the course of a law abiding citizen. In September, 1907, under the name of John H. Graham,

alias J. H. Gray, he was indicted in Wood County, West Virginia, for grand larceny, pleaded guilty and was sentenced to the penitentiary for five years.

In February, 1908, the prosecuting attorney for Marshall County, in which the penitentiary was located, presented an information to the circuit court of that county alleging that the convict Graham was the same man who had twice before been convicted as above stated. Graham was brought before the court, and pleaded that he was not the same person. Later he withdrew his plea, moved to quash the information, and on denial of the motion renewed the plea. A jury was called, and after hearing evidence for the prosecutor, the defendant offering none, returned a verdict identifying him as the person previously convicted. Thereupon the defendant moved for arrest of judgment upon the ground that the proceeding was in violation of the constitution of the State, and also contrary to the Fifth and Fourteenth Amendments of the Constitution of the United States. The motion was overruled and the court sentenced the prisoner to confinement in the penitentiary for life. The judgment was affirmed by the Supreme Court of Appeals of West Virginia. *State* v. *Graham*, 68 W. Va. 248. And the case comes here on error.

The proceeding was taken under §§ 1 to 5 of chapter 165 of the Code of West Virginia, which are as follows:

"1. All criminal proceedings against convicts in the penitentiary shall be in the circuit court of the county of Marshall.

"2. When a prisoner convicted of an offense, and sentenced to confinement therefor in the penitentiary, is received therein, if he was before sentenced to a like punishment, and the record of his conviction does not show that he has been sentenced under the twenty-third or twenty-fourth section of chapter one hundred and fifty-two, the superintendent of the penitentiary shall give

information thereof, without delay, to the said circuit court of the county of Marshall, whether it be alleged or not in the indictment on which he was so convicted, that he had been before sentenced to a like punishment.

"3. The said court shall cause the convict to be brought before it, and upon an information filed, setting forth the several records of conviction, and alleging the identity of the prisoner with the person named in each, shall require the convict named to say whether he is the same person or not.

"4. If he say he is not, or remain silent, his plea, or the fact of his silence, shall be entered of record, and a jury shall be empaneled to inquire whether the convict is the same person mentioned in the several records.

"5. If the jury find that he is not the same person, he shall be remanded to the penitentiary; but if they find that he is the same person, or if he acknowledge in open court, after being duly cautioned, that he is the same person, the court shall sentence him to such further confinement as is prescribed by chapter one hundred and fifty-two, on a second or third conviction, as the case may be."

The provisions of § 23 and 24 of chapter 152, to which the above statute refers, are:

"23. When any person is convicted of an offence and sentenced to confinement therefor in the penitentiary, and it is alleged in the indictment on which he is convicted, and admitted, or by the jury found, that he had been before sentenced in the United States to a like punishment, he shall be sentenced to be confined five years in addition to the time to which he is or would be otherwise sentenced.

"24. When any such convict shall have been twice before sentenced in the United States to confinement in a penitentiary, he shall be sentenced to be confined in the penitentiary for life."

These statutes were derived from the laws which were in force in Virginia before West Virginia was created and formed part of the Code of Virginia of 1860, c. 199, which in turn had been taken from the Code of 1849, c. 199.

The plaintiff in error challenges the validity of the legislation and the proceedings which it authorized, upon the grounds (1) that he has been deprived of his liberty without due process of law; (2) that he has been denied the equal protection of the laws; (3) that his privileges and immunities as a citizen of the United States have been abridged, and that he has been denied his immunity from double jeopardy; and (4) that cruel and unusual punishment has been inflicted.

1. The propriety of inflicting severer punishment upon old offenders has long been recognized in this country and in England. They are not punished the second time for the earlier offense, but the repetition of criminal conduct aggravates their guilt and justifies heavier penalties when they are again convicted. Statutes providing for such increased punishment were enacted in Virginia and New York as early as 1796, and in Massachusetts in 1804; and there have been numerous acts of similar import in many States. This legislation has uniformly been sustained in the state courts (*Ross's Case*, 2 Pick. 165, 170; *Plumbly* v. *Commonwealth*, 2 Met. 413, 415; *Commonwealth* v. *Richardson*, 175 Massachusetts, 202, 205; *Rand* v. *Commonwealth*, 9 Gratt. 738, 740, 741; *King* v. *Lynn*, 90 Virginia, 345, 347; *People* v. *Stanley*, 47 California, 113; *People* v. *Coleman*, 145 California, 609; *Ingalls* v. *State*, 48 Wisconsin, 647; *McGuire* v. *State*, 47 Maryland, 485; *State* v. *Austin*, 113 Missouri, 538), and it has been held by this court not to be repugnant to the Federal Constitution. *Moore* v. *Missouri*, 159 U. S. 673; *McDonald* v. *Massachusetts*, 180 U. S. 311.

In the *McDonald Case*, the statute (Mass. St. 1887, c. 435, § 1) provided that whenever one had been twice

convicted of crime and committed to prison in Massachusetts, or in any other State, he should, upon conviction of a subsequent felony, be deemed to be an "habitual criminal" and should be punished by imprisonment for twenty-five years. In delivering the opinion of the court, Mr. Justice Gray said (p. 312):

"The fundamental mistake of the plaintiff in error is his assumption that the judgment below imposes an additional punishment on crimes for which he had already been convicted and punished in Massachusetts and in New Hampshire.

"But it does no such thing. . . . The punishment is for the new crime only, but is the heavier if he is an habitual criminal. . . . The allegation of previous convictions is not a distinct charge of crimes, but is necessary to bring the case within the statute, and goes to the punishment only."

In the present case, it was not charged in the indictment on which the prisoner was last tried that he had previously been convicted of other offenses, but after judgment he was brought before the court of another county, in a separate proceeding instituted by information, and on the finding of the jury that he was the former convict he was sentenced to the additional punishment which the statute in such case prescribed.

By this proceeding he was not held to answer for an offense; the information did not allege crime. As was said by the Supreme Court of Appeals of West Virginia: "It (the information) alleges that he has been held to answer for crime and that he stands convicted of it through the indictment of the grand jury. It points him out as a convict already held, upon whom rests the general sentence of the law of life imprisonment. . . . The proceedings under the statute are for identification only. They are clearly not for the establishment of guilt. The question of guilt is not reopened." *State* v. *Graham*,

68 W. Va. 248, 251. Full opportunity was accorded to the prisoner to meet the allegation of former conviction. Plainly, the statute contemplated a valid conviction which had not been set aside or the consequences of which had not been removed by absolute pardon. No question as to this can be raised here, for the prisoner in no way sought to contest the validity or unimpaired character of the former judgments, but pleaded that he was not the person who had thus been convicted. On this issue he had due hearing before a jury.

It cannot be said that the prisoner was deprived of due process of law because the question as to former conviction was passed upon separately. While it is familiar practice to set forth in the indictment the fact of prior conviction of another offense, and to submit to the jury the evidence upon that issue together with that relating to the commission of the crime which the indictment charges, still in its nature it is a distinct issue, and it may appropriately be the subject of separate determination. Provision for a separate, and subsequent, determination of his identity with the former convict has not been regarded as a deprivation of any fundamental right. It was established by statute in England that, although the fact was alleged in the indictment, the evidence of the former conviction should not be given to the jury until they had found their verdict on the charge of crime. The act of 6 and 7 Will. IV, c. 111, provided that it should "not be lawful on the trial of any person for any such subsequent felony to charge the jury to inquire concerning such previous conviction until after they shall have inquired concerning such subsequent felony, and shall have found such person guilty of the same; and whenever in any indictment such previous conviction shall be stated, the reading of such statement to the jury as part of the indictment shall be deferred until after such finding as aforesaid." Exception was made in cases where the accused gave evidence

of good character to meet the charge of crime, whereupon the prosecutor might show the former conviction before the verdict of guilty had been returned. And in *Regina* v. *Shuttleworth*, 3 C. & K. 375, 376, Lord Campbell thus stated the practice under the statute: "It is the opinion of all the judges—The prisoner is to be arraigned on the whole indictment, and the jury are to have the new charge only stated to them; and if no evidence is given as to character, nothing is to be read to the jury of the previous conviction till the jury have given a verdict as to the new charge. The jury, without being resworn, are then to have the previous convictions stated to them; and the certificate of it is to be put in, and the prisoner's identity proved." See 24 & 25 Vict., c. 96, § 116.

If a State adopts the policy of imposing heavier punishment for repeated offending, there is manifest propriety in guarding against the escape from this penalty of those whose previous conviction was not suitably made known to the court at the time of their trial. Otherwise, criminals who change their place of operation and successfully conceal their identity would be punished simply as first offenders, although on entering prison they would immediately be recognized as former convicts. It is to prevent such a frustration of its policy that provision is made for alternative methods; either by alleging the fact of prior conviction in the indictment and showing it upon the trial, or by a subsequent proceeding in which the identity of the prisoner may be ascertained and he may be sentenced to the full punishment fixed by law. *Plumbly* v. *Commonwealth*, 2 Met. 413, 415, per Shaw, C. J. In the latter proceeding, as well as in the former, the fundamental rights of the defendant with respect to the ascertainment of his liability to the increased penalty may be fully protected.

Nor is there any reason why such a proceeding should not be prosecuted upon an information presented by a

competent public officer on his oath of office. There is no occasion for an indictment. To repeat, the inquiry is not into the commission of an offense; as to this, indictment has already been found and the accused convicted. There remains simply the question as to the fact of previous conviction. And it cannot be contended, that in proceeding by information instead of by indictment there is any violation of the requirement of due process of law. *Hurtado* v. *California*, 110 U. S. 516; *Brown* v. *New Jersey*, 175 U. S. 172, 175; *Maxwell* v. *Dow*, 176 U. S. 581, 584.

The principles governing a proceeding of this sort, to inquire into the fact of prior conviction, were stated in *Ross's Case* (1824), 2 Pick. 165, 169–171. The legislature of Massachusetts (St. 1817, c. 176, approved February 23, 1818) had provided for increased punishment upon second and third convictions. Reciting that the previous conviction might not be known to the grand jury or to the attorney for the commonwealth at the time of the indictment and trial, the statute contained the following provision closely resembling the one now under consideration:

"That whenever it shall appear to the Warden of the State Prison, . . . that any convict, received into the same, pursuant to the sentence of any Court, shall have before been sentenced, by competent authority of this or any other state, to confinement to hard labor for term of life or years, it shall be the duty of the said Warden, . . . to make representation thereof, as soon as may be, to the Attorney or Solicitor General; and they or either of them shall, by information, or other legal process, cause the same to be made known to the Justices of the Supreme Judicial Court, . . . and the said Justices shall cause the person or persons, so informed against, to be brought before them, in order, that if he deny the fact of a former conviction, it may be tried according to law, whether the charge contained in such

information be true. And if it appear by the confession of the party, by verdict of the jury, or otherwise, according to law, that said information is true, the Court shall forthwith proceed to award against such convict, the residue of the punishment provided in the foregoing section; otherwise the said convict shall be remanded to prison, there to be held on his former sentence." (Laws of Mass., 1815–1818, pp. 602, 603.) Ross, then undergoing sentence for five years was brought before the court pursuant to such an information, and his term of imprisonment was increased. In sustaining this sentence, the court, by Parker, C. J., said (p. 171):

"In regard to the objection made to the process, this is not an information of an offence for which a trial is to be had, but of a fact, namely, that the prisoner has already been convicted of an offence; and this fact must appear, either by his own confession, or by verdict of a jury, or otherwise according to law, before he can be sentenced to the additional punishment. Is he to be sentenced for an offence distinct from the one for which he has been tried upon an indictment? We apprehend not; but the only question is, whether he is such a person as ought to have been sentenced, on his last conviction, to additional punishment, if the fact of a former conviction had been known to the court. There was no need of a presentment by a grand jury, for no offence was to be inquired into. That had been already done. An indictment is confined to the question whether an offence has been committed. Here the question was simply whether the party had been convicted of an offence.

"It is said, that at common law both offences should be stated in the same count. The question upon this is, whether the legislature had not a right to prescribe a different mode; and we think they had."

In the case at bar, the record is silent upon the question whether the fact of the former convictions was known

at the time of the last indictment and trial. This, however, cannot be regarded as important from the constitutional standpoint. The indictment did not allege the prior convictions; the issue was not involved in the trial of the indictment and the court could not have considered these convictions in imposing sentence. *State* v. *Davis*, 68 W. Va. 142, 150, 151. They were not considered until the subsequent proceeding was had. Doubtless, as has been said, the object in providing the alternative proceeding is to make sure that old offenders should not be immune from the increased punishment because their former conviction was not known when they were last tried. But this does not define the limit of state power. Although the State may properly provide for the allegation of the former conviction in the indictment, for a finding by the jury on this point in connection with its verdict as to guilt and thereupon for the imposition of the full sentence prescribed, there is no constitutional mandate which requires the State to adopt this course even where the former conviction is known. It may be convenient practice, but it is not obligatory. This conclusion necessarily follows from the distinct nature of the issue and from the fact, so frequently stated, that it does not relate to the commission of the offense, but goes to the punishment only, and therefore it may be subsequently decided.

2. It is insisted that the plaintiff in error was denied the equal protection of the laws, in that the statute arbitrarily discriminates against the former convict—in a case like the present one—by requiring an information, instead of indictment, for the sole reason that he has been received into the penitentiary; so that, as the plaintiff in error puts it, "if he be out of the penitentiary, the defendant must be prosecuted by indictment in order to inflict the increased penalty, but if he be in the penitentiary, he is denied the right to indictment and must be prosecuted by information."

The argument is without merit. The statute in question applies to all those "convicted of an offense, and sentenced to confinement therefor in the penitentiary," who previously have been sentenced to a like punishment. The fact of such sentence, indicating the gravity of the offense, affords a reasonable basis for classification. Those who have been so sentenced once before, and those who have been so sentenced twice before, are subjected, respectively, to the same measure of increased punishment. In all cases, before the increased punishment can be inflicted, there must be conviction on the new charge; the former conviction must be shown, and there must be a finding by a jury, if the fact is contested, of the identity of the defendant with the former convict. The distinction, upon which the contention is based, has regard simply to the difference in procedure between the case where the fact of former conviction is alleged in the indictment, and determined by the jury on the trial of the charge of crime, and the case where it is charged in the information and determined by a jury in a proceeding thereby instituted. This, in view of the nature of the issue to be determined, cannot be said to give rise to a substantial difference in right or to any inequality within the meaning of the constitutional provision.

The Fourteenth Amendment is not to be construed "as introducing a factitious equality without regard to practical differences that are best met by corresponding differences of treatment." *Standard Oil Company* v. *Tennessee*, 217 U. S. 413, 420. A State may make different arrangements for trials under different circumstances of even the same class of offenses (*Brown* v. *New Jersey*, 175 U. S. 172, 177; *Missouri* v. *Lewis*, 101 U. S. 22, 31; *Hayes* v. *Missouri*, 120 U. S. 68, 71; *Lang* v. *New Jersey*, 209 U. S. 467); and certainly it may suitably adapt to the exigency the method of determining whether a person found guilty of crime has previously been convicted of

other offenses. All who were in like case with the plaintiff in error were subject to the same procedure. He belonged to a class of persons convicted and sentenced to the penitentiary whose identity as former convicts had not been determined at the time of their trial. As to these, it was competent for the State to provide appropriate means for determining such identity.

3. What has been said, and the authorities which have been cited, sufficiently show that there is no basis for the contention that the plaintiff in error has been put in double jeopardy or that any of his privileges or immunities as a citizen of the United States have been abridged. Nor can it be maintained that cruel and unusual punishment has been inflicted. *In re Kemmler*, 136 U. S. 436; *Moore* v. *Missouri*, *supra*; *McDonald* v. *Massachusetts*, *supra*; *Howard* v. *North Carolina*, 191 U. S. 126; *Coffey* v. *Harlan County*, 204 U. S. 659; *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86, 111.

The questions raised under the constitution of the State are not open here, and in no aspect of the case does it appear that any right of the plaintiff in error under the Constitution of the United States has been infringed.

Judgment affirmed.